

WESTERN STATES WATER COUNCIL

Annual Report 2005

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2005

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

40th Annual Report



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OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

The first official meeting of the Western States Water Council was held on the south shore of Lake Tahoe, at Stateline, Nevada on August 3, 1965. The Western Governors' Conference approved the creation of the Western States Water Council during meetings in Portland, Oregon on June 10-13, 1965. The Governors' resolution explicitly stated: "The future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality." Further, the governors felt that a fair appraisal of future water needs, and the most equitable means of meeting such needs, demanded a regional effort. Water availability and interbasin transfers of water were important issues. Western states found themselves in an era of rapid federal water resources development, and regional or basinwide planning, without a sufficient voice in the use of their water resources. The Western States Water Council has since provided a unified voice on behalf of western governors on water policy issues.

The emphasis and focus of the Western States Water Council has changed over the years as different water policy problems have evolved. However, the commitment towards reaching a regional consensus on issues of mutual concern has continued. The Council has proven to be a dynamic, flexible institution providing a forum for the free discussion and consideration of many water policies that are vital to the future welfare of the West. As envisioned by the Western Governors' Conference, it has succeeded as a continuing body, serving the governors in an expert advisory capacity. Over the years, the Western States Water Council has sought to develop a regional consensus on westwide water policy and planning issues, particularly federal initiatives. The Council strives to protect western states' interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management.

Council membership and associate membership status is determined based on a request from the governor. Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING**. In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. **HAWAII** was a member from 1991-1999. In 1999, **OKLAHOMA** requested and received membership. In 2000, both **KANSAS** and **NEBRASKA** joined the Council at the request of their respective governors. Council membership is automatically open to all member states of the Western Governors' Association. Other states may be admitted by a unanimous vote of the member states.

Associate membership has also been granted states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership.

Each member state's governor is an ex-officio Western States Water Council member. The governor may appoint up to three Council members or representatives, and as many alternate members as deemed necessary. They serve at the governor's pleasure. (Associate member states are limited to two representatives and two alternates.)

Council officers, including the Chair, Vice-Chair, and Secretary-Treasurer, are elected annually from the membership. State representatives are appointed to working committees, with one representative per state also appointed to an Executive Committee. The Executive Committee attends to internal Council matters with the assistance of a Management Subcommittee, which includes the Council officers, immediate past Chair, and Executive Director. The Council's working committees are the Legal Committee, the Water Quality Committee, and the Water Resources Committee. Each working committee is directed by a committee chair and vice-chair. Committee chairs, in turn, name special subcommittees and designate subcommittee chairs to study issues of particular concern.

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2005, meetings were held in: Boise, Idaho on April 20-22nd; Seattle, Washington on July 12-15th; and San Antonio, Texas on October 19-21st. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events, related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. The dues for FY2005 (ending June 30, 2005) were set at \$25,000 per state. They have remained at this level for some years now. A copy of the audit performed for the fiscal year ending June 30, 2005 can be obtained from the Council office. The auditors noted "no matters involving the internal control over financial reporting and its operation that we consider to be a material witness," and "no instances of non-compliance that are required to be reported herein under *Government Auditing Standards*."

During 2005, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Deputy Director; and a secretarial staff consisting of Cheryl Redding, and Julie Groat.

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Jack Stults - Montana
Ann Bleed - Nebraska
Michael Linder - Nebraska
(Alternate)*
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Allen Biaggi - Nevada
(Alternate)*
William Hume - New Mexico
John D'Antonio - New Mexico
(Alternate)*
Ron Curry - New Mexico
(Alternate)*
Dale Frink - North Dakota
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Steve Pirner - South Dakota
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Farm Bill Subcommittee

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Phil Ward - Oregon
Walt Baker - Utah
Stephen Bernath - Washington
Sue Lowry - Wyoming

*For purposes of Committee rosters, the designation as "alternate" may not necessarily reflect the person's status regarding Council membership, but rather the person's function on the Committee.

Management Subcommittee

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(Vice-Chair)
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(Secretary/Treasurer)
Karl Dreher - Idaho
(Past Chair)
D. Craig Bell
(Executive Director)

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Dee C. Hansen - Utah

Endangered Species Act Subcommittee

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Phil Ward - Oregon
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Western Water Supply Challenges Subcommittee

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Hugh Ricci - Nevada
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(Alternate)*
John Utton - New Mexico
(Alternate)*
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Barbara Markham - Washington
Hugh McFadden - Wyoming

Federal Reserved Water Rights Subcommittee

Christopher Estes - Alaska
Susan Cottingham - Montana
Norman Johnson - Utah

Legal Education Subcommittee

Candace West - Montana
Norman Johnson - Utah

Amicus Brief Subcommittee

Candace West - Montana
Jim Davenport - Nevada
John Guhin - South Dakota
Norman Johnson - Utah

General Adjudication Fees Subcommittee

Karl Dreher - (Chair) - Idaho
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Roland Westergard - Nevada
Norman Johnson - Utah

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(Vice-Chair)
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(Alternate)*
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David A. Vogler - Nebraska
(Alternate)*
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(Alternate)*
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Duane A. Smith - Oklahoma
Phil Ward - Oregon
Garland Erbele - South Dakota
Thomas Weir Labatt - Texas
David Montagne - Texas
(Alternate)*
Dee C. Hansen - Utah
D. Larry Anderson - Utah
(Alternate)*
Ken Slattery - Washington
Joe Stohr - Washington
(Alternate)*
Patrick Tyrrell - Wyoming
Sue Lowry - Wyoming
(Alternate)*

Border Water Issues Subcommittee

Jeanine Jones - California
Karl Dreher - Idaho
Jack Stults - Montana
Sherry Tippet - New Mexico
Dale Frink - North Dakota
Herman Settemeyer - Texas

Drought/Flooding Issues Subcommittee

Jack Stults - Montana (Chair)
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Jeanine Jones - California
John D'Antonio - New Mexico
Sherry Tippet - New Mexico
Duane Smith - Oklahoma
D. Larry Anderson - Utah
Doug McChesney - Washington

Water Transfers and the Public Interest

Jeanine Jones - California	Duane Smith - Oklahoma
Norman Semanko - Idaho	Phil Ward - Oregon
Tom Stiles - Kansas	Weir Labatt - Texas
Tim Hall - Montana	Pat Tyrrell - Wyoming
Jim Davenport - Nevada	

Water Information Management and Data Collection Subcommittee

Phil Ward - Oregon (Chair)	Estevan Lopez - New Mexico
Hal Simpson - Colorado	Duane Smith - Oklahoma
Hal Anderson - Idaho	Barry Norris - Oregon
Karl Dreher - Idaho	Barney Austin - Texas
David Pope - Kansas	Larry Anderson - Utah
Jack Stults - Montana	Sue Lowry - Wyoming

Water Resources Management and Program Funding Subcommittee

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Rod Kuharich - Colorado	Duane Smith - Oklahoma
Hal Simpson - Colorado	Kevin Ward - Texas
Norm Semanko - Idaho	Larry Anderson - Utah
Adrian Polansky - Kansas	
Mike Volesky - Montana	
Eileen Grevey Hillson - New Mexico	

Water Use Efficiency/Conservation Subcommittee

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Herb Guenther - Arizona	Jack Stults - Montana
Jeanine Jones - California	Jim Davenport - Nevada
Lester Snow - California	Estevan Lopez - New Mexico
Rod Kuharich - Colorado	Kevin Ward - Texas
Norm Semanko - Idaho	Larry Anderson - Utah
Dave Pope - Kansas	Stephen Bernath - Washington

High Plains Work Group

Dave Pope - Kansas (Chair)	Garland Erbele - South Dakota
Hal Simpson - Colorado	Weir Labatt - Texas
Jack Stults - Montana	Sue Lowry - Wyoming
Dean Couch - Oklahoma	Pat Tyrrell - Wyoming
Duane Smith - Oklahoma	

WATER QUALITY COMMITTEE

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Joan Card - Arizona
Paul Frohardt - Colorado
(Chair)
Toni Hardesty - Idaho
Ron Hammerschmidt - Kansas
Karl Mueldener - Kansas
(Alternate)*
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(Vice-Chair) (Alternate)*
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Michael Linder - Nebraska
Patrick Rice - Nebraska
(Alternate)*
Allen Biaggi - Nevada
Ron Curry - New Mexico
Sherry J. Tippet - New Mexico
(Alternate)*
Fred Lujan - New Mexico
(Alternate)*
David Glatt - North Dakota
Miles Tolbert - Oklahoma
Steve Thompson - Oklahoma
(Alternate)*
Lauri Aunan - Oregon
Steve Pirner - South Dakota
Kathleen Hartnett White - Texas
David Montagne - Texas
(Alternate)*
Walter Baker - Utah
Dee Hansen - Utah
(Alternate)*
Jay Manning - Washington
Stephen Bernath - Washington
(Alternate)*
John Corra - Wyoming
John Wagner - Wyoming
(Alternate)*

Arid West Water Quality Issues Subcommittee

Paul Frohardt - (Chair) - Colorado
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Tom Stiles - Kansas
Chris Levine - Montana
Susan Braley - Washington
Bill DiRienzo - Wyoming

Clean Water Act Subcommittee

Paul Frohardt - Colorado
Susan Burke - Idaho
Tom Stiles - Kansas
Richard Opper - Montana
Walt Baker - Utah
Stephen Bernath - Washington

Good Samaritan Subcommittee

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Bill Hume - New Mexico

Section 518/Tribes as States Subcommittee

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Derek Smithee - Oklahoma
Tom Laurie - Washington

Quality-Quantity Interrelationship Subcommittee

Tom Stiles - (Chair) - Kansas

WESTERN STATES WATER COUNCIL

Committee Assignments

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Herb Guenther	- Arizona
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Rod Kuharich	- Colorado
Hal Simpson	- Colorado
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Karl Dreher	- Idaho
David L. Pope	- Kansas
Jack Stults	- Montana
Ann Bleed	- Nebraska
Michael Linder	- Nebraska
(Alternate)*	
Roland Westergard	- Nevada
Allen Biaggi	- Nevada
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William Hume	- New Mexico
John D'Antonio	- New Mexico
(Alternate)*	
Ron Curry	- New Mexico
(Alternate)*	
Dale Frink	- North Dakota
Miles Tolbert	- Oklahoma
Duane A. Smith	- Oklahoma
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Phil Ward	- Oregon
Steve Pirner	- South Dakota
Thomas Weir Labatt	- Texas
D. Larry Anderson	- Utah
Jay Manning	- Washington
Patrick Tyrrell	- Wyoming

Water Resources Committee

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Gary Prokosch	- Alaska
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Tom Maddock	- California
Jeanine Jones	- California
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Norman Semanko	- Idaho
David L. Pope	- Kansas
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Jack Stults	- Montana
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Mike Volesky	- Montana
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Ann Bleed	- Nebraska
Hugh Ricci	- Nevada
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Ken Slattery	- Washington
Joe Stohr	- Washington
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Patrick Tyrrell	- Wyoming
Sue Lowry	- Wyoming
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Ron Hammerschmidt	- Kansas
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2nd Row L to R: Paul Frohardt, Hal Simpson, Dave Pope, Walt Baker, Pat Tyrrell, Bill Hume, Dee Hansen and Weir Labatt

3rd Row L to R: Larry Anderson, Adrian Polansky, Karl Dreher, Jim Davenport, Dean Couch, Stephen Bernath, and Garland Erbele

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Back Row: Tony Willardson and Craig Bell
Front Row: Julie Groat and Cheryl Redding

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Anthony G. Willardson (Tony)	Deputy Director
Cheryl Redding	Office Manager
Julie Groat	Receptionist/Secretary

COUNCIL MEETINGS

147th Council Meetings Boise, Idaho April 20-22, 2005

The Western States Water Council's 147th meetings were held in Boise, Idaho on April 20-22. Governor Dirk Kempthorne was unable to attend, but welcomed the Council to Idaho with a letter stating, "These truly are historic and challenging times for water management.... While winter brought relief to much of the West, Idaho is experiencing one of its driest years ever. In the Upper Snake River Basin, we are moving into our sixth straight year of drought – the longest continuous drought cycle in recorded state history, with a recurrence interval estimated to be in excess of 500 years. We are determined to find workable solutions to Idaho's water shortage problems." He mentioned disputes between ground water and surface water users on the Eastern Snake River Plain, and the recent agreement with the Nez Perce Tribe, "settling the single biggest claim on Idaho's water." He concluded, "Together, we can develop water management strategies beneficial to all water users, throughout the West."

The regular meetings of the Council were preceded by a Water Conservation Roundtable discussion on Wednesday morning between state and federal water agencies. Similar discussions on different topics were held as part of the year's Council meetings. The roundtable began with WSWC Chairman Hal Simpson presenting a suggested definition of water conservation, and describing what conservation is and what it is not. For example, minimizing use and losses from on-farm irrigation systems and off-farm canals and laterals also results in a reduction in return flows and/or incidental ground water recharge – which may be detrimental to other water users or uses, including wetlands and other environmental uses – without perhaps increasing basinwide water use efficiency or reducing total ground water pumping if farmers expand their irrigable acreage. A site-specific review of proposed measures and their impact on other water rights and water uses is necessary to evaluate the costs and benefits of conservation.

Other participants included: Dave Pope, Chief Engineer, Kansas Division of Water Resources; Richard Tullis, Assistant General Manager, Central Utah Water Conservancy District; U.S. Bureau of Reclamation Deputy Commissioner Mark Limbaugh; Roger Gorke, Environmental Protection Agency (EPA), Policy Advisor to the Assistant Administrator for Water; Deputy Chief, Natural Resources Conservation Service (NRCS), Tom Christensen; and John Johnson, Farm Services Agency (FSA) Deputy Administrator. Each described agency actions and their perspective on water conservation.

Following the roundtable discussion, Idaho hosted a tour of the Thousand Springs area and aquaculture along the Snake River, with appetizers and dinner featuring locally raised trout, catfish and alligator. The availability of high quality and consistent cold water springs for raising trout, as well as geothermally heated waters for producing catfish, tilapia and alligators, provide a unique and cost competitive environment for aquaculture. However, declining springflows due to changing and more efficient irrigation practices on the Eastern Snake Plain, together with increasing pumping of ground water, have impaired senior surface water rights to the springs, requiring the Idaho Department of Water Resources (IDWR) to cutoff junior ground water uses, unless junior users can mitigate the injury they cause senior users.

At the full Council meeting, IDWR Director Karl Dreher elaborated on the issues involving the Eastern Snake Plain Aquifer (ESPA), which underlies some 10,000 square miles of southeastern Idaho. The fractured basalt is very transmissive and in places is thousands of feet thick. It is estimated that the aquifer stores nearly a billion acre-feet (af) of water. The ESPA's average annual

recharge is around 7.5Maf and about half that is incidental to irrigation. At one time the accepted irrigation practice was to divert and apply enough water to bring the water table up to the root zone. The advent of sprinkler irrigation systems in the 1960s significantly reduced labor, energy demands and water use – but also greatly reduced the artificially enhanced recharge, while increasing ground water pumping. Today nearly 75% of the land is irrigated with sprinklers and center pivots, which can be run remotely from a laptop computer. The impact on the aquifer has been dramatic, with discharges down from a peak of 6,800 cubic feet per second (cfs) in the 1950s to 5,200 cfs today.

Conflicts between senior surface water rights and junior ground water users had also grown as changes in the nature of use and the hydrologic connection between surface and ground waters have become apparent. The state was in the difficult position of trying to define the impacts of junior uses on senior rights and administer both according to priority. Moreover, state water law provides that senior water users may not make a “futile call” for water where shutting off junior users would not make a significant amount of water available to the senior users. In the case of ground water, the impacts of pumping and shutting down the pumps had a delayed temporal effect. The state had used a ground water flow model, jointly developed with participation by all the affected parties, to determine expected temporal impacts and make decisions. Further, Idaho’s state water plan and water policies are designed to “promote the optimum management and utilization of the state’s water resources,” with a goal to “secure greater productivity, in both monetary and nonmonetary terms, from existing water supplies.” This raised the issue of how best to use ESPA ground water resources, while protecting senior surface water rights.

On April 19, Karl Dreher issued an order in response to a call for water from seven canal companies and irrigation districts with senior surface water rights in the Magic Valley that would curtail the exercise of all ground water uses with a priority date of February 27, 1979 that affect the irrigation of 80,810 acres of land in two water districts over the ESPA. The ground water districts had until April 29 to try and find 133,400 af to satisfy the call with “replacement water,” rather than curtail their use, and must file their plans with IDWR for approval. Plans would be reviewed and approved or disallowed by May 6. Orders responding to other delivery calls in the Thousand Springs were expected in the coming weeks.

Bill Rinne, Deputy Commissioner of the Bureau of Reclamation and Director of Operations, also addressed members. He noted that the current system of dams and reservoirs was doing an “amazing job,” given the drought, in continuing to meet water supply and delivery demands. The Colorado River system can hold about a 4-year supply, and was still about half full after years of drought. Is the drought over? We don’t know. What will happen after the drought breaks? Will we still have water supply issues? Do we have enough water? These questions had yet to be answered, but they were making “pretty good” progress improving water management. He described Interior’s Water 2025 program, Reclamation’s Field Services Program and related Challenge Grants. He also discussed the critical need for investment in aging infrastructure, dam safety and drought response authority, as well as other priorities.

The Council adopted a position statement in the form of a letter to Senator Pete Domenici and other western congressmen calling for enactment of S. 648, S. 802 and H.R. 1386. The latter bills refer to the National Drought Preparedness Act, which would establish a National Drought Council and a national drought planning and preparedness policy.² The former bill would extend authorities in the Reclamation States Drought Assistance Act. The Council also recommended changes to be forwarded (by request) to the Western Governors’ Association (WGA) with respect to an updated resolution on Arid West Water Quality Issues.

²*Western States Water*, Issue #1613, April 15, 2005.

The Water Resources Committee discussed the drought legislation, and recent congressional briefings. Pat Tyrrell and Craig Bell reviewed their presentations at the Senate Water Conference.³ Special guests included: Mike O'Neill, U.S. Department of Agriculture, discussing water conservation and water security; Kevin Crum, U.S. Army Corps of Engineers, describing the installation of removable weirs to aid downstream fish passage at Columbia and Snake River dams; Chris Hyland, Corps, and Gary James, Umatilla Tribe, explaining the Walla Walla River Basin feasibility study to restore anadromous fish runs; and Kathy Peter, U.S. Geological Survey, discussing streamgaging.

Clive Strong, Idaho Deputy Attorney General, and Norm Semanko described water issues in Idaho, emphasizing conjunctive use issues and the Nez Perce settlement, before the Legal Committee. Bill Staudenmaier highlighted provisions of the Arizona Water Rights Settlement, while Craig Bell and Shaun McGrath reported on the prospects for other Indian water right settlements. Jim Davenport reported that a WSWC report on water right "takings" had been accepted for publication by the Denver Water Law Journal. Bill also described claims by state agencies with responsibility for state school trust lands (carved out from federal lands), to assert federal reserved water rights.

The Water Quality Committee discussed and approved the recommended changes to the WGA policy resolution related to the Clean Water Act and arid areas, and considered the need to renew other WGA resolutions. Roger Gorke described EPA Office of Water activities and talked about the documentation of environmental results. Paul Frohardt discussed water quality standards for effluent dependent and dominated waters, and Tom Stiles added his thoughts on water quality and water quantity related issues. Craig reviewed an earlier report by the Council on water reuse and ground water recharge. Lastly, the Committee talked about issues related to tribes setting and administering water quality standards, pursuant to treatment as states under Section 518 of the Clean Water Act.

**148th Council Meetings
Seattle, Washington
July 12-15, 2005**

The Western States Water Council's 148th meetings were held in Seattle, Washington July 13-15, where the Council celebrated its 40th anniversary, having been established by the Western Governors Conference in 1965. On Thursday evening, July 14, former Council members joined in person and by phone with current members to share recollections. These included Wes Steiner, former advisor to Governor Pat Brown of California when the Council was created and later Executive Director of the Arizona Department of Water Resources and Council Chair, and Roland Westergard, a current member having the longest tenure of any member in the history of the Council - 37 years, and also a former Council Chair while serving as the head of the Nevada Department of Natural Resources. Mr. Steiner spoke about the creation of the Council and Mr. Westergard reflected on the history and accomplishments of the Council. Other former officers of the Council also spoke. The evening culminated with remarks by Bureau of Reclamation Commissioner, John Keys, who read a congratulatory letter from President Bush, a former ex-officio member of the Council while serving as Governor of Texas.

The anniversary program was preceded on Wednesday morning with a workshop on "Water Data Collection and Management Programs," a field trip organized by the State of Washington on

³*Western States Water*, Issue #1612, April 8, 2005.

Wednesday afternoon and evening, and the regular meetings of the Council during the day on Thursday.

The workshop began with a panel on the state role in water data collection and management. This was followed by a federal panel and discussions. Attendees then considered possible recommendations, which focused on strengthening the USGS cooperative streamgaging program. These recommendations were subsequently considered by the members of the Water Resources Committee the following morning.

The workshop was followed by a field trip to the Puyallup River Watershed, where participants had a chance to visit the Federation Forest, one of the last old growth tree groves in the area. The group stopped at the Mud Mountain dam, built to protect downstream interests from floods, and then at Lake Tapps, a complex project to supply water while protecting the lake and associated instream values. A last stop took place at one of Seattle's waterfront parks, where a Northwest bar-b-que was enjoyed.

The Water Resources Committee began the following morning by considering several proposed policy positions. The first endorsed passage of S. 895, the "Rural Water Supply Act of 2005." The letter noted the Council's strong support for federal legislation to provide technical and financial assistance for small rural communities, and expressed the Council's belief that Title II of the bill, authorizing a new loan guarantee for certain projects, represented an important and much needed tool. The Committee approved the letter for Council consideration. The Committee also approved a resolution endorsing S. 517, the Weather Modification Technology Transfer Act of 2005, a letter supporting passage of legislation to reauthorize appropriations for the state water resources research institutes program. Action was pending on the Senate floor. Further, a resolution asking for full utilization of the funds provided through the Reclamation Act for its intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs was approved by the Committee.

The Committee also approved a letter to Secretary of Interior, Gale Norton, urging her to request \$74M in FY 2007 for the USGS Cooperative Water Program. The letter stated: "this amount would merely restore the program's real purchasing power to its FY 2003 level and reverse the slow erosion in spending that is robbing us of streamgages and data that is vital..." In a related matter, the Committee endorsed for Council consideration a letter to the Senate and House Conferees considering the Interior spending bill, which includes House report language that "strongly discourages" the USGS from providing commercially available services in competition with the private sector. While endorsing current USGS policy to avoid competition with the private sector, the letter took issue with the House report language and the serious negative implications it could have on the Cooperative Water Program and providing critical water data.

Prior to these actions, the Committee heard from Bob Hirsch on the status of the USGS Cooperative Water Program and later from Philip Mote of the University of Washington on climate impacts, snowpack and snowmelt in the Northwest. The Committee then heard status reports on the Reclamation States Emergency Drought Relief Act, the Bridging-the-Headgate Partnership, the work of the water resources management and funding subcommittee, the study being undertaken by the National Academy of Sciences on the Colorado River, and the upcoming Water Information Management Systems workshop.

The Water Quality Committee met next for a joint session with members of the Water Resources Committee for a discussion on water reuse and its implications for water quality and water rights. Following a presentation on related state programs in Washington and Arizona, Walt Baker, head of the Utah Division of Water Quality, described the potential implications from his

perspective, drawing on a case study from the Park City area. A representative from EPA's Office of Water, Len Fleckenstein, also offered some observations, and later discussed developments from EPA headquarters. Jack Barnett, Executive Director of the Colorado River Salinity Control Forum, also addressed the Committee, describing the situation of increasing concentrations of selenium in the river.

The Committee then heard updates from the subcommittee working on tribal water quality administration issues under Section 518 of the Clean Water Act, and the status of another subcommittee's efforts to address water quality standards for effluent dependant and dominated waters. After receiving a report on actions taken at the Western Governors' Association Annual meeting, the Committee approved a resolution endorsing specified WGA resolutions. The Committee had earlier forwarded to the WGA recommendations related to CWA reauthorization and/or amendments. The Committee concluded with a brief discussion on improving process and participation.

The Executive Committee met to review the budget and related matters, to hear a report on the priorities of new WGA Chair, Governor Napolitano of Arizona, and to review positions scheduled to sunset. The Committee recommended that the positions be allowed to sunset, with the exception of the resolution opposing repeal of current national plumbing efficiency standards.

The Legal Committee met in the afternoon. Following a report on current legal issues in Washington by Alison Bond, the meeting featured a discussion on state general adjudications. Reports on state initiatives were given from representatives of Montana, Oregon, New Mexico and Idaho. The presentations reflected on the complexity and expense of these proceedings, but also on their utility and the fact that progress was being made in concluding them. Recommendations and lessons learned were shared.

Maria O'Brien, of New Mexico, next updated the Committee on the progress of collaborative efforts to reach solutions to the complex problems in the Middle Rio Grande. Susan Cottingham then reported on the outlook for Indian water rights settlements. Although new to the Council, Susan has long been associated with the Ad Hoc Group on Indian Water Rights as head of the Montana Reserved Rights Compact Commission, and as such underscored the increasing difficulties that negotiations are facing. She encouraged involvement in the upcoming symposium on settlements sponsored by the WSWC and the Native American Rights Fund, for September 14-16, in Moscow, Idaho.

On Friday, Jay Manning, Director of the Washington Department of Ecology, addressed the Council, describing some of the current issues and challenges in the State. In the process, he described the state-wide watershed planning program started some years ago. The results were mixed among the numerous watersheds in the State, but where the major stakeholders had stayed involved, including the tribes, successful outcomes had been achieved. John Keys, Bureau of Reclamation Commissioner, next addressed the Council. He described the budget for the Bureau, its priorities, and the status of the 2025 initiative. He expressed confidence that the 2025 initiative would proceed, although funding would still be limited, pointing to the ability to leverage appropriated amounts through the Challenge Grant Program. He also said the BOR would continue to support the Bridging-the-Headgate partnership. Brigadier General Joseph Schroedel, Commander of the South Pacific Division of the Corps of Engineers, followed. He emphasized the Corps' reorientation to an agency to serve its customers' priorities. He had visited with several water organizations during his tenure and said that the Council was the ideal organization to which the Corps could look for priorities. He encouraged the Council to think in these terms and recommended formation of a federal subcommittee made up of representatives of all the relevant federal agencies to meet regularly with the Council for this purpose.

The Council adopted the recommendations of the respective committees regarding external policy positions. In light of the resignation of Roger Patterson of Nebraska as Secretary-Treasurer,⁴ the Council elected Jack Stults, head of the Water Resources Division of the Montana Department of Natural Resources and Conservation, to replace him in this position. Hal Simpson, State Engineer of Colorado and Duane Smith, Director of the Oklahoma Water Resources Board, were re-elected as Chair and Vice-Chair, respectively.

**149th Council Meetings
San Antonio, Texas
October 19-21, 2005**

The 149th meetings of the Council were held in San Antonio, Texas on October 19-21. Governor Rick Perry wrote, welcoming members to the Lone Star State, "Since the early pioneer days, many have converged upon this great land to chart a new day for themselves and their families.... As we look to that future, no issue is more important than ensuring sound stewardship of our resources. We take pride in our awareness of water issues, and take seriously the challenge of balancing the management of this resource to meet the needs of our people, our economy, and our environment. The 50-year Texas State Water Plan is a monumental achievement in water policy; the plan provides a comprehensive assessment of water supplies in Texas and identifies locally formulated strategies to ensure that these supplies are developed and managed effectively and efficiently. Continuing and implementing these measures in Texas, and other initiatives throughout the nation, demands unrelenting focus. As you continue to do so, I wish you every success."

The meetings began with a roundtable discussion focused on sustainable water development and funding, particularly in rural areas, that is summarized under "other meetings" in this report. Following the roundtable, Council members and guests enjoyed a tour of some of the facilities of the San Antonio Water Authority (SAWS), including a ground water recharge project, their flood control tunnel inlet and outlet works, and a joint wastewater treatment/wildlife project operated in cooperation with the Audubon Society at Lake Mitchell. The tour also included the San Jose Mission and parts of the acequia (community ditch) system that connects the old Spanish missions. It concluded with a visit to the Witte Museum and its World of Water exhibit, where the tour joined a social hour hosted by the Texas Water Conservation Association.

On Thursday, the Water Quality Committee met first. Roger Gorke, with the Environmental Protection Agency (EPA), Office of Water, filled in for Ben Grumbles, EPA Assistant Administrator for Water, who was unable to attend as he had been called to testify before the Congress. The Committee discussed a long list of topics including the integration of water quality and water quantity policies, treatment of tribes as states (TAS) in setting water quality standards, Good Samaritan cleanups of abandon mines, confined animal feeding operations (CAFOs), water quality program funding issues, water transfers, the Ninth Circuit Court's decision setting aside EPA's delegation of National Pollutant Discharge Elimination System (NPDES) permitting authority to Arizona, and other matters. The Committee did act to recommend that a sunset provision in support of EPA's Section 319 program be renewed, and resent to the Office of Management and Budget (OMB) and EPA. The Committee also suggested adding another paragraph regarding selenium control to a proposed position on the Farm Bill.

The Water Resources Committee met next, and made a number of changes to the proposed Farm Bill position. Many related issues of interest had been discussed during the roundtable on

⁴*Western States Water*, Issue #1625, July 8, 2005

Wednesday morning. Another proposed position was approved calling on the National Aeronautics and Space Administration (NASA), National Oceanic and Atmospheric Administration (NOAA), and U.S. Geological Survey (USGS) to ensure that the appropriate thermal sensors are included to replace the present Landsat data and high resolution capabilities in any future satellites. A sunseting position regarding the Endangered Species Act (ESA) was also renewed. Bob Hirsch, USGS Associate Director for Water, addressed members on a number of issues, including the impact of Hurricane Katrina and the need for better realtime data and hazards assessments. This was a priority for USGS. Unfortunately, drought was not one of the listed hazards. He thanked members for their support for the National Streamflow Information Program and Cooperative Water Program, and announced that a stakeholders roundtable to discuss the programs would be held on January 30 - February 1, 2006 in Austin, Texas.

A special presentation on the nexus between energy and water resources was made by John Geesman, California Energy Commission, and Doug Arent, with the National Renewable Energy Lab (NREL) in Golden, Colorado. They both stressed the need for integrated resources planning strategies as both water and energy supplies are vulnerable to shortages. Appropriately, Mike Slayton, with the St. John's Water Management District in Florida, next talked on behalf of the Desalination Coalition to the Water Resources Committee about supporting legislation in the Senate and House to authorize the Secretary of Energy to provide incentive payments to owners and operators of qualified facilities to partially offset the cost of required electrical energy in desalination (S. 1016 and H.R. 1071). Concern with brine waste well disposal was also raised. Jack Stults then discussed drought policy and relief bills, noting the WSWC's recent testimony.⁵

The Committee determined it would add an item to its work plan on "emerging technologies," which would include desalination, energy, climate variability, etc.

The Executive Committee discussed the work plan, Western Governors' Association (WGA) agenda, and a number of potential areas of common interest with WGA Chairman Janet Napolitano, Governor of Arizona, that include aging infrastructure, desalination, drought relief, and water augmentation through weather modification, watershed management, conjunctive use of ground and surface water resources, and reductions in water delivery system losses. The Committee also determined that it would focus next year's Water Management Symposium on "Emerging Technologies and Issues." Further, the Committee discussed three sunseting positions and recommended further action.

The Legal Committee began with an extended presentation by Jim Davenport on state water export laws and cases before and since *Sporhase v. Nebraska* (1982), focusing on changes since 1991. Arthur Van Wagenen, a WSWC law school summer intern, helped compile the information on changes in state law. Jim's powerpoint presentation focused on water as an economic good, and included a discussion of Chilean water law and its evolution as a free market model. Next, Jim addressed a law review article on "takings," which he and WSWC Executive Director Craig Bell have authored, together with other members of the Legal Committee.

Kathleen Hartnett White, Chair, Texas Commission on Environmental Quality (TCEQ), spoke on legal issues and the challenge of meeting the needs of a population that is expected to double by 2050. Regional water planning projections were that Texas would face shortages of up to 38% of demand in a future drought, and 66% of the mitigation strategies included some type of redistribution of existing supplies, most likely moving irrigation water to other uses. Texas hadn't clearly defined the property rights to water, and many believe when amendments to existing rights are proposed that

⁵*Western States Water*, Issue #1637, September 30, 2005.

the state should do some sort of environmental analysis and condition the exercise of the new rights. TCEQ also had to consider applications for the non-consumptive instream use of some 13.5 million acre-feet of water filed by environmental interests concerned with water quality and Texas' estuaries and bays. The Commission denied the applications based on its lack of jurisdiction and a legislative mandate that water may only be appropriated as expressly authorized by law. Subsequent legislation created an Environmental Flows Commission, but its recommendations had yet to be acted upon by the Texas State Legislature. She also reviewed the legal history related to ground water management and the Edwards Aquifer, which is under the control of a local authority that can limit water withdrawals (to maintain water levels sufficient to protect springflows and related endangered species).

Tom Graff and Mary Kelly, Environmental Defense Fund (EDF), next addressed members on the use of markets and water transfers as a means to provide for environmental water needs, even where streams are now fully appropriated, as well as to avoid unnecessary development of new supplies (reservoirs and well fields), while moving toward a more sensible valuation and use of limited water supplies. Markets allow for the voluntary transfer of existing water rights to meet shifting demands through sales, leases and dry-year options – primarily from agricultural to municipal and environmental uses. There are constraints. In some cases, there is a lack of an adequate legal framework to encourage transfers, as well as a lack of flexibility in some river basins. They specifically referred to the seven-state Colorado River Basin. There are also third-party impacts and impacts on rural communities. There is also the question of who pays for water for environmental purposes. They called for setting environmental flow “targets,” and using public investments in water conservation to acquire the needed water, while recognizing there are additional challenges in trying to manage large-scale transfers and acquire freshwater flows necessary to maintain the health of bays and estuaries.

Afterwards, Robin Smith, TCEQ counsel, reported on a meeting of the Western Adjudication Conference, and Susan Cottingham reported on the annual WSWC/Native American Rights Fund (NARF) Symposium on Indian Water Rights Settlements held last month in Moscow, Idaho.⁶ Sharonne O'Shea, Washington State Assistant Attorney General, then reported on the Federal District Court in Seattle's decision recognizing the rights of the Lummi Indian Nation to ground water on the reservation, which includes an island and peninsula near the Canadian border in northwest Washington. Surface water is limited and not suitable for many uses. The court recognized agricultural and domestic uses as the “primary purposes” for establishment of the reservation, rejecting the tribe's “permanent tribal homeland” claims.⁷ The court determined that the practicable irrigable acreage standard was not helpful in quantifying domestic needs. The court rejected a Lummi argument that water was not appertinent to Indian lands purchased by non-Indians, but remained the property of the tribe. Washington does not regulate domestic wells, and significant domestic non-Indian uses within the reservation rely on ground water.

On Friday, during the full Council meeting, each of the proposed positions and renewed sunseting positions were presented during Committee reports and adopted with some modifications. Robert Puente, a Texas State Representative, Todd Chenoweth, TCEQ, and Weir Labatt, Texas Water Development Board, all addressed the Council on water resources issues in Texas. While “water is life,” Rep. Puente observed, it seems political change comes only when there is a drought and a budget surplus! Texas faced huge infrastructure needs, but this year it was raining and there was a \$2-\$3B budget deficit. Careful planning, water conservation and water reuse are key issues.

⁶*Western States Water Speical Report*, Issue #1636, September 23, 2005.

⁷*Western States Water*, Issue #1620, June 3, 2005.

Weir added that it was important to involve local interests to ensure they “buy into” plans to address water supply problems. He also mentioned desalination goals and environmental flow needs. Mr. Chenoweth explained Texas water law, which in the Lower Rio Grande Valley is unique. It does not adhere strictly to the Appropriation Doctrine, but retains some aspects of Spanish colonia law, including a priority for municipal use, with junior agricultural uses. A watermaster regulates water use.

Jason Peltier, Deputy Assistant Secretary of Interior for Water and Science, spoke next. He described USGS and the Bureau of Reclamation’s Katrina response, bird flu and migratory concerns, CALFED implementation, Colorado River shortage criteria, and litigation in the Klamath and Columbia River Basins. He noted the slow progress on policy and difficulty working with uncertainty.

OTHER MEETINGS

Water Information Management Systems Workshop

Thirty five representatives from ten states gathered in Missoula, Montana on September 7-9, to discuss continuing innovations in information technology as it relates to water resources management and water rights administration. Jack Stults, Water Resources Division Administrator for the Montana Department of Natural Resources and Conservation (and WSWC Secretary-Treasurer), welcomed the group, noting that drought still afflicted Montana and accurate, real-time water resources information was of growing importance. Jim Hill, described Montana's Natural Resources Information System (NRIS), which served as a one-stop shop for compiling and sharing data, as well as visualization resources and direct public access. Other presenters described and discussed the importance of satellite thermal imaging in identifying and tracking irrigated areas that are also marked with aerial photography. Political support for NASA's LANDSAT was badly needed. As current satellites age and fail, without new sensors, this capability would be lost. The National Integrated Drought Information System, National Water Information System, water rights adjudications and data, surface and ground water use data, predictive tools, regional water planning, data sets and data viewers were other topics raised and discussed.

Indian Water Rights Settlement Symposium

Over 200 people gathered for the ninth symposium on Indian Water Rights Settlements cosponsored by the Western States Water Council and the Native American Rights Fund in Moscow, Idaho on September 14-16. Karl Dreher, Director of the Idaho Department of Water Resources and immediate Past Chairman of the Council, welcomed participants on behalf of the Council. In his remarks, he observed that the success of future negotiations will depend upon the reasonableness of the outcomes and the federal government owning up to its trust responsibility for the tribes. He emphasized that this trust responsibility goes well beyond a narrow interpretation of litigation costs and potential liability for breach of trust. Rebecca Miles, Chairwoman of the Nez Perce Tribe, welcomed the participants as well. She spoke of the difficulty her tribe had with discussing the "negotiation" of a longstanding right belonging to the tribe, in the context of the Nez Perce Settlement approved last year by Congress, also known as the Snake River Settlement. Reaching the point where the tribe could approve the settlement required much discussion and soul searching. She saw it as the most important decision by the tribe in the last 100 years and probably for the next 100 years.

The keynote speaker was Barbara Cosens, Associate Professor of Law at the University of Idaho in Moscow, and formerly legal counsel to the Montana Reserved Water Rights Compact Commission. She emphasized six major points in her presentation. First, she noted that uncertainty is necessary to bring parties to the table to negotiate. The process of negotiation involves the distribution of risks regarding these uncertainties. Her second point was that there is no substitute for honesty and trust in the negotiations. This is difficult to achieve and settlements must be accompanied by enforcement, looking to the future, but trust in the process of negotiations is indispensable. Her third point was that because the nature of negotiated settlements result in voluntary outcomes rather than mandated actions from courts, these voluntary outcomes must be perceived as reasonable in order to be successful. Fourth, a negotiated settlement will almost invariably involve giving up some aspects of sovereignty, meaning control, in order to gain control from others in the negotiations. "It is the federal government's fault," was her fifth point. She was careful to distinguish between federal policies and federal representatives, many of whom were in the room and whom she listed by name as deserving credit for many of the settlements that have been approved. She thought the current criteria and procedures guiding the process should be

scrapped, as they allow too narrow a view of federal responsibility and the respective financial contributions that should be made. Her last point was that “finality” is undesirable and, in any event, cannot be achieved. The goal of settlements should be to resolve as many issues as possible, but negotiators must recognize that issues will arise in the future and negotiate their terms with that understanding.

Professor Cosens’ remarks were followed by panels that have traditionally been held on the opening day of the symposium, designed to provide information on the basics of putting a settlement together. The first panel was entitled, “Gathering Background Information and the Role of Technicians in Negotiations.” The featured speakers on the panel were: Chris Kenney, Director of the Native American Affairs Office in the Department of Interior; Gregory Ridgley, Deputy Chief Counsel in the Office of the New Mexico State Engineer; and Susan Williams of Williams & Works, a law firm located in Corrales, New Mexico. Mr. Kenney, who has been participating at these symposia for several years now, presented a slideshow describing the basic process under which the federal government becomes involved, and the expertise that can be brought to bear in negotiations. Mr. Ridgley spoke of his experience in New Mexico, emphasizing the desirability of assembling a common database among the negotiating parties. Susan Williams felt it was particularly important for tribes to employ technicians and experts who are very familiar with tribes, their culture and heritage, as well as their water needs.

In the afternoon, a panel discussed, “Identifying Parties and Issues and How Negotiations Bind Larger Groups.” Bill Staudenmaier, WSWC Legal Committee Chair and an attorney for Ryley, Carlock and Applewhite in Arizona, described his involvement in the Arizona Water Settlement. He emphasized in particular a process that Arizona has adopted for identifying parties who should be part of any negotiations. The decades long process of arriving at the Arizona Water Settlement resulted in a long and complex document, which he thought had little chance for passage when introduced in Congress last year. But the political strength of the parties involved in the negotiations, and the dedication of the congressional delegation from Arizona worked to secure passage last December. Rodney Lewis, Counsel to the Gila River Indian Community, the driving entity behind the Arizona settlement, described his perspectives on the process, as well as the outcome. He emphasized that success in the courts at various stages in the process was a chief reason for the success of the outcome for his tribe. Susan Schneider, Senior Tribal Attorney for the Environment and Natural Resources Section of the Department of Justice, described how the section is organized, how many lawyers are assigned to Indian water rights claims, and the general approach of the Department of Justice, both as negotiations proceed and after they culminate.

The last panel of the day explored a new issue for the symposium; that is, “Post-Settlement Management Issues.” Jay Weiner, Legal Counsel for the Montana Reserved Water Rights Compact Commission, noted that while the mechanism had not yet been tested, a formal procedure had been adopted to address issues that arise post-settlement. Bruce Sunchild, Chairman of the Water Resources Committee of the Chippewa Cree Tribe in Montana, addressed the process and outcomes of his settlement, noting that the trust that had been established with others in the negotiations would serve them well in the future. Duane Mecham of the Office of the Solicitor of the Department of Interior described the issue primarily in the context of the Nez Perce Settlement (also approved last year at the end of the congressional session) noting that from the time the “term sheet” was agreed to among the negotiating parties, three months were given to prepare the appropriate executing instruments and other documentation. Seeing this as essentially a “post-settlement” phase of the negotiations, he offered his perspectives on how the parties were successful in this short timeframe. Indeed, he felt the short time in some ways served them well.

The next morning featured a presentation on the Administration’s settlement policy by Jennifer Gimbel, Counselor to the Secretary of the Interior and Chair of the Indian Water Rights Settlement

Working Group. Jennifer, a former member of the Council from both Wyoming and Colorado, was good natured but frank about the federal government's fiscal constraints. In response to earlier comments, she noted that if we scrap the current criteria and procedures, there would be little to talk about, as far as the Administration was concerned. They could doubtless be improved, but were necessary to guide the Administration's involvement. Given the fiscal constraints, she emphasized the need for creativity in approaching the critical issue of funding. However, she emphasized the continuing commitment of the Administration to their trust responsibility for tribes and pledged her best efforts to support negotiated settlements.

Jennifer also described the work of the working group which she chairs within Interior. She said once the working group has achieved consensus, they present their views to the Office of Management and Budget (OMB), who review it to determine if it is consistent, in their view, with the criteria and procedures. A federal position is thereafter defined and presented. In this context, she saw the criteria as flexible. While the Administration would continue to be guided by them, hours had been spent with OMB about their interpretation, particularly regarding the notion that contributions should be proportionate to benefits. However, there comes a time when settlements will continue to go forward, and even consistency with the criteria and procedures does not guarantee approval she said. And of course, Congress is not bound by these criteria. With regard to creativity, she noted that state and local parties, in particular, are going to have to "dig deeper," and a big settlement every year is unlikely. She also noted that a hearing on the proposed Duck Valley Settlement was scheduled within the next few weeks. There would likely be much that could be learned from this hearing about the Congressional response to the Administration's policies. As with the other presentations the previous day, time was provided for questions. A central theme of the questions revolved around the desirability of continuing a settlement policy, given the many constraints that always existed, but were now exacerbated.

A response panel followed Ms. Gimbel's remarks. Susan Cottingham, Program Manager of the Montana Reserved Water Rights Compact Commission, felt the Administration had pulled back from their willingness to fund these settlements, particularly in light of the size of the settlements approved in Arizona and Idaho. While noting the obvious tragedy that occurred along the Gulf Coast and the need to respond, she also noted that Congress had just signed into law a \$286B transportation measure that contained a record number of projects inserted by members of Congress from both parties. Her conclusion was that funding by Congress continued to be a matter of priorities, and that we need to work together to ensure that Indian water right settlements become a higher priority. OMB was driving the process and using the criteria and procedures as a weapon in their pullback from federal funding. She urged more authority be given to local negotiating teams, and that the criteria and procedures must be broadened if they are to be retained. Nelson Cordova, Water Rights Adjudication Coordinator for the Taos Pueblo, described the needs of tribes and their view of water as sacred. He described some of the ongoing negotiations in New Mexico, and also underscored the importance of the federal government abiding by its trust responsibilities. He noted that if we could get "wet water" to the reservation, then there could be substantial economic development and less dependence by tribes on federal funding. Shaun McGrath, Program Manager for Water and Drought at the Western Governors' Association, next described the activities of the Ad Hoc Group of Indian Water Rights, composed of the Western Governors' Association, the Western Business Roundtable, the Native American Rights Fund, and the Western States Water Council. He noted the longstanding support of the governors in support of settlements and the activities of the Ad Hoc Group to that end. While recognizing the need for creativity in looking at the issue of funding, he expressed the hope that the federal government would do its part in looking at new options to secure the necessary funding. He noted that it may take a "crisis" of sorts in the form of five or six settlements coming before the Congress to gain the kind of attention that was warranted.

Following a brief lunch break, participants heard an overview of the Nez Perce Settlement. First, Steve Moore, Attorney for the Native American Rights Fund, presented a power point presentation describing the purposes and key features of the settlement. Next, Rebecca Miles, who as Chairwoman of the Nez Perce Tribe had welcomed the group the previous day, described in more detail the process to settlement from the Tribe's perspective. It had been very difficult, particularly for many of the tribal elders. She said that if the option were presented to "negotiate" their water rights, they would not have elected that option, but the Tribe was brought in during the course of the Snake River Basin Adjudication, and negotiations were seen as an option that should be pursued in the interest of the Tribe in that context. Frank Wilson, Attorney for the Office of the Regional Solicitor of the Department of Interior, referred to some of the major features of the settlement, emphasizing that the tribal interest was primarily represented in sustaining and enhancing fisheries, since salmon had been their traditional food source. He also described the nature of federal involvement in the process.

Clive Strong, Deputy Attorney General for the Idaho Attorney General's Office, described the process by which the settlement was achieved. He noted that many of the features of the settlement, as in every settlement, would be unique, but that elements of the process should be transferrable. He emphasized there must be a sense of urgency and a consequent desire for settlement. There must be a safe environment for discussion and key governmental interests and other entities must be represented. Trust must be established among the parties and jurisdictional issues must be approached as opportunities to offer sharing of responsibilities. While Chairwoman Miles and Mr. Strong agreed that there were many in the Tribe and in the State that opposed the settlement, the settlement was ultimately seen as a very positive outcome for both the State and the Tribe, as well as the federal government.

Immediately following these presentations, the participants were taken on a field trip of Snake River Settlement features, primarily the tribal fish hatchery. While not yet complete, it represents a state-of-the-art facility, where fish are raised and "exercised" so as to facilitate to the maximum extent possible their assimilation into natural stream habitats. The field trip culminated in a dinner at the tribal administration complex in Lapwai.

On Friday morning, September 16, participants heard from a number of congressional staff via conference call about the outlook for getting settlement bills through Congress. Participants included Nate Gentry and Mike Connor of the Senate Energy and Natural Resources Committee, Jim Hall and Steve Lanich of the Office of Native American and Insular Affairs of the House Resources Committee, and Kimberly Teehee, Staff Member to the House Native American Caucus. The increasingly difficult fiscal constraints for any discretionary spending was a common theme echoed by these congressional staff committee members. In light of Hurricane Katrina, spending would have to be reduced overall, affecting many programs of the federal government, including programs within the Department of Interior. The effort to secure settlements would therefore be an uphill battle, but early involvement by the respective congressional delegation in the process of negotiation was recommended. This involvement and ownership of the outcome is key to obtaining the support of congressional delegations, which is in turn a critical element in the success of any settlement. More than one staff representative noted that the current settlement fund for negotiated settlements is not adequate and that without a permanent fund dedicated to this purpose, it would become increasingly difficult.

Following the opportunity for questions, and after a brief break, a response panel offered their remarks. Pam Williams, Director of the Secretary of Interior's Indian Water Rights Office, was the first to offer her thoughts following the congressional staff. She echoed Mr. Lanich's remarks that the "squeeze is on." Already facing substantial budget constraints, Hurricane Katrina had made everything worse. Nevertheless, she noted the record of achievement over the years of approving

settlements and funding them, and looked forward to working with Mr. Connor (who had remained on the phone following the break) and others to secure settlements in the future. But it was obviously going to be a more difficult task. Stanley Pollock, Counsel to the Navajo Nation, described his experience and obvious disappointment in what he saw was the Administration's narrow interpretation of their trust responsibility. Mr. Pollock remarked on the notion that we need to create a crisis. He noted that there was a disaster on the Navajo Nation Reservation right then, where 40% of the Navajo Nation need to haul water. When disaster strikes, we don't ask as a nation how big the disaster is before we decide to respond, he said. As far as the call for creativity, Mr. Pollock saw no "silver bullet." The money was going to have to come from somewhere else. What we needed to do was communicate the crisis on the reservations to the Congress.

John Utton, representative to the Council from New Mexico and Attorney with Sheehan, Sheehan & Stelzner, explored various sources of potential revenue to fund settlements, including redirecting funds from some other program, creative sources of funding, such as the mechanism used in the Arizona Water Settlement, which utilized the Lower Colorado Basin Fund, utilizing other federal assets, and by obtaining funding through an "omnibus" Indian water right settlement bill. John Thorson, currently Administrative Law Judge of the California Public Utilities Commission, and formerly long-time Water Master in Arizona, introduced himself as an author. He, together with Bonnie Colby and Sarah Britton had just published a book distributed to all attendees entitled: "Negotiating Tribal Water Rights - Fulfilling Promises in the Arid West." (University of Arizona Press 2005, 520-621-1441, see also at www.uapress.arizona.edu.) He noted that liability to fund Indian needs, including water settlements, had been established because Anglo-Americans had forced Native Americans from their ancestral lands, which represented essentially a "hurricane of dislocation." He also recognized that the constraints were real and that the major parties, including tribes and states, would need to do more to build support, including expanding linkage with environmental interests. He noted in conclusion that relationships that are built in the process of negotiations are their biggest strength and should be the focus for further efforts to build support.

Mr. Connor responded to the panel's remarks by underscoring the importance of the upcoming hearing on the proposed Duck Valley Settlement. He thought that settlements in the future must be "tight," meaning that there must be more attention paid to the reasonableness of outcomes and the respective benefits to the parties.

Clayton Matt was the wrap-up speaker for the symposium. He serves as the Natural Resources Department head for the Confederated Salish and Kootenai Tribes. Mr. Matt summarized many of the points that had been made during the conference, and drew from his experience in his current position in sharing perspectives on these points. He then underscored the increasing difficulty facing tribes and states and others seeking settlement.

Roundtable on Funding for Water Development and Management for a Sustainable Future

Hal Simpson, WSWC Chair, welcomed those participating in a roundtable discussion focused on sustainable water development and funding, particularly in rural areas, as part of the Council's meetings in San Antonio, October 19-21, 2005. He raised a number of issues for discussion, including the challenge of meeting our future water needs in the face of federal cuts in discretionary spending due to the war and hurricane disaster assistance. He mentioned drought response planning, desalination, agricultural conservation spending and federal permitting for water projects as important issues. Norm Semanko, a WSWC member and President of the National Water Resources Association, addressed westwide reclamation issues. He focused on aging infrastructure and the need to preserve existing facilities, while developing new water supplies for the future. Some facilities will require major reconstruction, and there needs to be a means for project sponsors to repay such rehabilitation costs over time.

Next, Krysta Harden, CEO, National Association of Conservation Districts (NACD), noted that issues related to water and the urban-rural interface affect counties and conservation districts everywhere. NACD and WSWC share interests related to implementing the current and future Farm Bill, as well as improving the Endangered Species Act (ESA), water quality and drought response. USDA conservation, commodity and other programs faced significant cuts as the Congress tried to find money to fund supplemental emergency appropriations. Ken Peterson, Deputy Director of the Texas Rural Water Association, then addressed the National Associations Farm Bill priorities, including expanding USDA's Rural Utility Services (RUS) water and waste disposal loan and grant program. He reported over 93% of the nation's 54,000 community water systems serve less than 10,000 homes, with 2.2 million rural residents live with critical water supply problems, including 730,000 with no running water in their homes.

Duane Smith, WSWC Vice Chair and Executive Director of the Oklahoma Water Resources Board, said the state needed \$5.4B over the next 20 years to meet projected water and wastewater demands, for another 2.2M people. Moreover, people are moving from rural areas to the cities, making it more difficult to maintain and finance rural systems with a declining tax base. The state has a blind pool financing program that allows the state to issue bonds for projects that have not yet been identified, then loan the money to rural communities to finance their water needs at a reduced interest rate and substantial cost savings – some \$450M over the life of the program – which means that money is available for other community needs. The Board also administers the federal Clean Water and Drinking Water State Revolving Funds (SRFs). Without such assistance, many rural Oklahoma communities may not survive.

A second panel discussed current federal programs. Roger Gorke, EPA Office of Water, noted the SRFs must compete with other federal priorities for money. There is a large and growing gap between water infrastructure needs and spending. In order to otherwise try to address such needs, EPA was emphasizing four “pillars,” which include better system management, water use efficiency, full cost water pricing, and watershed management.

Next, Steve Chick, the Natural Resources Conservation Service's (NRCS) acting division director for financial assistance and Nebraska State Conservationist, talked about Farm Bill programs to encourage conservation of surface and ground water resources under the Environmental Quality Improvement Program (EQIP). While 60% of EQIP funding was earmarked for improving livestock management practices, including efforts to control non-point sources (NPS) water pollution from Confined Animal Feeding Operations (CAFOs), some money (\$51M) was set aside specifically for water conservation and more than half had gone to western states. Overall, there were some 6950 related EQIP ground water and surface water conservation program applications and 2556 contracts were awarded covering over 360,000 acres. This program had been used to improve irrigation management through the installation of center pivots, surge valves, subsurface drip systems, salt cedar control, and converting from irrigation to dryland farming. NRCS also provided technical assistance for the Conservation Reserve Program (CRP) and CRP Enhancement Program (CREP), administered by the Farm Services Agency (FSA).

John Fuston, FSA, Texas Executive Director, and Juan Garcia, FSA, further addressed the CRP and CREP, which pay farmers to retire lands for conservation purposes. John reported there are over 5.7M acres of irrigated land in Texas. Little irrigated land had been enrolled in the past in the CRP, given the relatively high cost of related payments, compared to dryland rates. CRP had enrolled over 3.9M acres in Texas. There were 19 counties where more than 25% of eligible lands had been enrolled. John is from the Panhandle, where much of Texas' irrigated cropland is located. Pumping costs would affect the future of irrigation in the region as fuel costs had jumped 20-30% since 2003. Juan is from the Valley (Rio Grande), which has been hard hit in the past by drought. FSA also administers an Emergency Conservation Program (ECP) for disaster assistance, and low interest

loans to help mitigate physical losses and increased operating expenses, but little money had been appropriated.

Lastly, Bryan Daniels, USDA's Texas Director for Rural Development, RUS, described programs available to help rural utilities, which were otherwise unable to obtain commercial financing at reasonable rates, with basic water and wastewater needs through loans and grants. Despite maintaining a national portfolio of \$16B in loans, there was still a 3-year waiting list. This program covers unincorporated areas and towns of less than 10,000 and availability was limited. Nationwide, 60% of the money is in loans, while 40% is grants. He also described the needs of "colonias" along the border. RUS also provided funds for technical assistance for small rural systems through a "circuit rider" partnership with the National Rural Water Association designed to help maintain water systems.

OTHER IMPORTANT ACTIVITIES AND EVENTS

Council Staff and Membership Changes/News

Arizona

Governor Janet Napolitano appointed **Joan Card**, Director of the Water Quality Division, as an alternate member replacing Karen Smith.

Colorado

Steve Gunderson was named as the Director, Water Quality Control Division, replacing Mark Pifher, and thus listed as an alternate member of the Council by virtue of that appointment.

Montana

Susan Cottingham, Program Manager, Reserved Water Rights Compact Commission, was named by Montana Governor Brian Schweitzer as a new WSWC representative. Also, named as new alternate members were **Tim Hall**, Co-Lead Counsel for the Montana Department of Natural Resources and Conservation, and **Mike Volesky**, the Governor's Natural Resources Policy Advisor.

Nebraska

Governor Dave Heineman, appointed **Ann Salomon Bleed** to the Council replacing Roger Patterson, former Director of the Nebraska Department of Natural Resources.

David Vogler left the Nebraska Department of Natural Resources to take a position as Hearings Officer with the Montana Department of Natural Resources & Conservation, Water Resources Division.

Oregon

Lauri Aunan was appointed Administrator, Water Quality Division, replacing Holly Schroeder and added to Council membership by virtue of that appointment.

Wyoming

Hugh McFadden, Assistant Attorney General, was appointed by Governor Dave Freudenthal as a member of the Council replacing Jennifer Golden. Governor Freudenthal also selected Administrator, **John Wagner** to serve as a full delegate replacing Gary Beach.

Washington

Governor Christine O. Gregoire appointed **Jay Manning**, Director of the Washington State Department of Ecology, as a member of the Council replacing Linda Hoffman. **Ken Slattery**, Program Manager was also appointed as a full representative to the Council replacing Joe Stohr, who was designated as an alternate member.

Western States Water

Since the first issue in 1974, the Council's weekly newsletter, *Western States Water*, has been one of its most visible and well received products. Its primary purpose is to provide governors, members, and others with accurate and timely information with respect to important events and trends. It is intended as an aid to help achieve better federal, state, and local decisionmaking and problem solving, improve intergovernmental relations, promote western states' rights and interests, and point out policy trade-offs. Further, it covers Council meetings, changes in Council membership, and other Council business. The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressmen and their staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee.

The following is a summary of significant activities and events in 2005 primarily taken from the newsletter. However, it does not represent an exclusive listing of all Council activities or other important events. Rather, it seeks to highlight specific topics.

Bureau of Reclamation

Reclamation Fund

On April 5, Senator Pete Domenici (R-NM), Chair, Senate Energy and Natural Resources Committee, led a Water Conference discussion addressing a broad array of water related challenges. Experts from across the country were invited to submit written proposals for presentation on water supply/resource management and coordination, the future of the Bureau of Reclamation, Indian and Federal reserved water rights, and our water knowledge/conservation/technological developments.

Pat Tyrrell, the Wyoming State Engineer, presented the Council's thoughts on the future of the Bureau of Reclamation. He stated, "The Bureau of Reclamation has an important and continuing role in meeting present and future water supply needs in the West." He observed that role continues to evolve from being a large builder to being a water and power purveyor and manager. Pat also pointed out that rehabilitation of existing projects, as well as necessary maintenance, and dam safety related work, must be a top priority. Water conservation efforts will also continue to be essential. However, the development of new supplies is essential using both storage and more innovative approaches (such as water reuse, ground water recharge, desalination, etc.).

To fund this work, Pat suggested, based on a current Council position, that the Congress consider increasing appropriations for Bureau of Reclamation projects and programs using the unobligated balance in the Reclamation Fund. The actual unobligated balance at the end of Fiscal Year 2004 was over \$3.8B, and it is estimated to grow at about \$1B/year through FY2006 – to \$5.9B. The Reclamation Fund was created in 1902, and the Congress intended these funds to be used to meet the need for water development and management in the West. Estimated rehabilitation needs for aging Bureau infrastructure total approximately \$645M for the foreseeable future. Reclamation estimates it needs \$227M over the next five years for dam safety work. In FY 2004, \$4M was directed towards Water 2025 Initiative Challenge Grants, to assist local districts improve the water delivery and management systems. Over 100 proposals were received requesting more than \$25M to help fund \$98M in improvements. For FY 2005, the Bureau has again received over 100 proposals asking for \$35.5M for new work with an estimated cost of more than \$115M. These programs and new legislative authorities being considered by the Committee need funding that could be provided from the Reclamation Fund, including drought preparedness, planning and mitigation, small rural community needs, salt cedar control, etc.

Further, Pat declared that the Bureau of Reclamation and western states must continue to work in partnership to meet the diverse needs of a growing population. The federal government must continue to respect state granted property rights to water, and the rights of states to allocate and manage their water resources. The Bureau should also adopt proactive, non-regulatory, incentive-based approaches to managing the waters under its control, consistent with western states' rights. Specifically, Reclamation should continue to pursue and fund work related to the existing Bridging-the-Headgate Partnership, Field Services Program, Challenge Grants and drought planning and preparedness activities.

Water 2025

On April 7, during a review of Reclamation's budget by the Energy and Water Appropriations Subcommittee, Senator Christopher Bond (R-MO) questioned the success of Interior's Water 2025 Initiative. He asked Thomas Weimer, acting Assistant Secretary for Water and Science, and Commissioner John Keys, about reports that Water 2025 is not working to ease tensions and avert water wars in the West. Environmentalists have largely dismissed the program as ignoring damage caused by the diversion of rivers and other resources (Greenwire, April 4, 2005). The Bureau's \$946.7M budget request is down slightly from last year, but calls for nearly doubling spending for Water 2025. Keys said that Water 2025 was not simply a repackaging of previous agency activities and programs, adding that \$4.5M made available in Challenge Grants had been used to leverage \$30M in non-federal spending for projects. (Environment & Energy Daily, April 8, 2005)

Of note, on April 26, Keys announced the Challenge Grant Program would be extended to state governments. "The Water 2025 initiative recognizes that state government agencies have a leading role in avoiding future water supply crises. The Challenge Grant Program for Western States will specifically help state water agencies respond to this challenge." The program will be particularly focused on "the development and use of water markets, structural modifications that will conserve water and improve water management, and other approaches. Among these measures are the use of analytical tools that will help states better administer or more efficiently manage water rights, comply with interstate compacts, or otherwise stretch scarce water...." Eligible applicants include state government water management agencies and authorities.

Clean Water Act

Pesticides

On February 1, the Environmental Protection Agency (EPA) published a notice of proposed rulemaking and an interpretive statement regarding issues pertaining to the regulation of pesticides applied to or over waters of the United States under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Clean Water Act. EPA determined that the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA did not constitute the discharge of a pollutant that required a National Pollutant Discharge Elimination System (NPDES) permit. EPA first published the interpretive statement in the Federal Register for public comment on August 13, 2003. In this rulemaking notice, EPA also proposed to revise the NPDES permit program regulations to incorporate the substance of the interpretive statement.

Wetlands/SWANCC

On April 27, Senator Russell Feingold (D-WI) introduced the Clean Water Authority Restoration Act (S. 912), to overturn the 2001 U.S. Supreme Court's decision that the Environmental Protection Agency (EPA) and Army Corps of Engineers cannot enforce federal Clean Water Act

(CWA) wetlands protections solely on the basis that a waterbody is used as habitat for migratory birds. In *Solid Waste Agency of Northern Cook County* (SWANCC), a 5-4 decision limited the agencies' authority to use the so-called migratory bird rule as the basis for asserting jurisdiction over non-navigable, intrastate, isolated wetlands, streams, ponds, and other bodies of water. Identical legislation (H.R. 1356) was introduced in the House on March 17, by Rep. James Oberstar (D-MN), and referred to the Transportation and Infrastructure Committee's Water Resources and Environment Subcommittee.

In his introductory remarks, Senator Feingold noted, "In its discussion of the case, the Court went beyond the issue of the migratory bird rule and questioned whether Congress intended the Clean Water Act to provide protection for isolated ponds, streams, wetlands and other waters, as it had been interpreted to provide for most of the last 30 years. While not the legal holding of the case, the Court's discussion has resulted in a wide variety of interpretations by EPA and Corps officials that jeopardize protection for wetlands, and other waters." He stated, "My home State of Wisconsin has passed legislation to assume the regulation of isolated waters, but many other States have not. This patchwork of regulation means that the standards for protection of wetlands nationwide are unclear and confusing, jeopardizing the migratory birds and other wildlife that depend on these wetlands.... These wetlands absorb floodwaters, prevent pollution from reaching our rivers and streams, and provide crucial habitat for most of the Nation's ducks and other waterfowl, as well as hundreds of other bird, fish, shellfish and amphibian species. Loss of these waters would have a devastating effect on our environment." He added, "In addition, by narrowing the water and wetland areas subject to federal regulation, the decision also shifts more of the economic burden for regulating wetlands to state and local governments."

The proposed legislation's stated purpose was to "provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution." It included a number of findings that explain the basis for Congress to assert its constitutional authority over waters and wetlands on all relevant constitutional grounds, including the Commerce Clause, the Property Clause, the Treaty Clause, and Necessary and Proper Clause.

The bill would redefine the term "waters of the United States [as]...all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." Further, it would strike the term "navigable waters of the United States" wherever it appears and insert therein "waters of the United States."

State Revolving Funds

On June 20, the Senate Environment and Public Works Committee ordered reported a \$38B bill, the Water Infrastructure Financing Act (S. 1400). It would authorize an additional \$20B for the Environmental Protection Agency's (EPA) Clean Water State Revolving Fund and \$15B for the Drinking Water State Revolving Fund (DWSRF), as well as another \$3B for grants (over the next five years). The bill was jointly introduced on July 14, by Senate Environment and Public Works Committee Chairman James Inhofe (R-OK), Senator James Jeffords (D-VT), the Ranking Minority Member, and Senator Hillary Clinton (D-NY). Senator George Voinovich (R-OH) is also a cosponsor.

S. 1400 directed the Environmental Protection Agency Administrator to establish a program to provide grants to "eligible entities for use in carrying out projects and activities the primary

purpose of which is watershed restoration through the protection or improvement of water quality (Section 110). Under Section 207 of the bill, Critical Drinking Water Infrastructure Projects, EPA would be directed to establish a grant program to assist communities in meeting the Safe Drinking Water Act requirements. Section 208 would amend the Safe Drinking Water Act to provide the Administrator “may provide” grants to capitalize revolving funds to provide financing to “qualified private, nonprofit entities” for predevelopment costs (including planning, design and facility siting) and “short-term costs incurred for replacement equipment, small-scale extension services, or other small capital projects that are not part of the regular operations and maintenance activities of existing water systems.” Loans could not exceed \$100,000 over no more than 10 years.

Section 402

In an August 5 memo, EPA General Counsel Ann Klee and Ben Grumbles, Assistant Administrator for Water, for the first time articulated EPA’s position on the “Applicability of Section 402 of the Clean Water Act to Water Transfers.” The memo, which was addressed to Regional Administrators, represented EPA’s interpretation of whether or not National Pollutant Discharge Elimination System (NPDES) permits are required for water control facilities and “water transfers,” defined as “any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use.” The memo notes that the question had arisen because activities such as transbasin transfers of water for various water supply purposes may also move pollutants from one water body to another. “The Supreme Court recently addressed this issue in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), leaving the matter unresolved.”

Framing the issue, the memo stated that the “precise legal question... is whether the movement of pollutants from one navigable water to another by a water transfer is the ‘addition’ of a pollutant.... The question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies. The issue also requires consideration of how the statute divides responsibility between the federal and State governments for controlling sources of water pollution. As a matter of long-standing practice, EPA has not issued NPDES permits for mere water transfers; nor has it ever stated in any general policy or general guidance that an NPDES permit is required for such transfers.”

It concluded, “Based on the statute as a whole, we confirm the Agency’s longstanding practice and conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under Section 402 of the CWA. Furthermore, the Agency intends to initiate a rulemaking process to address water transfers.” It added that no “factual, case-specific inquiry” into whether a particular water transfer constitutes an “addition” is required, but if “EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is ‘meaningfully distinct’ under the Supreme Court’s decision in *Miccosukee*” certain relevant factors would be considered.

Endangered Species Act

In a split decision, the 9th Circuit Court of Appeals vacated EPA’s approval of Arizona’s application to assume authority to administer Clean Water Act (CWA) permitting programs in the state, finding that EPA had erred in concluding that it did not have discretion to consider the effects of the delegation on listed and endangered species. EPA relied on a Fish and Wildlife Service (FWS) biological opinion (BiOp) prepared following consultation with FWS. While the BiOp noted that no federal agency would have the legal authority following the delegation to consult with

developers concerning the potential impact on listed species of any pollution permits, and cited the possible negative effects of that situation on threatened species, it found this lack of “consultation benefits” did not represent an “indirect effect” of the authorization action under the Endangered Species Act (ESA). Further, the BiOp concluded that this loss of consultation benefits under Section 7 of the ESA reflected a decision of Congress in granting states the right to administer these programs upon meeting specific criteria set forth in the CWA. The BiOp also found that other federal and state laws were sufficient to protect endangered species. The court of appeals disagreed.

Writing for the majority of the three judge panel, Judge Marsha Berzon criticized EPA’s decision “that it had to consult, but had no authority to do anything concerning the matter about which it had to consult.” She wrote: “One would not expect that Congress would set up such a nonsensical regime. Not surprisingly, it did not.” Citing the language of the Act, its legislative history and case law, she said both the obligation of federal agencies to consult and the requirement to “insure” against jeopardy were triggered by “any action authorized, funded, or carried out by such agency.” Responding to the argument that EPA’s decision was not an “action” under the ESA, because EPA had no discretion to look beyond the specific criteria for delegation set forth in the CWA, Judge Berzon went back to the 1978 Supreme Court’s description of the legislative history of ESA in *TVA v. Hill*. She concluded that the “authority conferred on agencies to protect listed species goes beyond that conferred by agencies’ own governing statutes,” and that Congress had explicitly established saving endangered species as “first priority” for federal agencies. This meant, according to the court, that despite the direction in the CWA that EPA “shall approve” the application for delegation to the state upon meeting the specified criteria, the agency not only had the discretion but the responsibility to consider the impacts of its decision on listed species. The BiOp’s consideration of the impacts of EPA’s decision, upon which EPA relied, was therefore fatally flawed, because of its premise regarding the absence of EPA discretion.

The court also concluded that the BiOp ignored the effect of the loss of Section 7 consultation that would result from delegation, and found its findings of the existence of sufficient protections elsewhere in federal and state law to be unconvincing. These included a memorandum of agreement (MOA) between EPA and FWS on consultation, Section 9 of the ESA prohibiting any “take,” and oversight by EPA and state agencies. The court went on to examine other analyses that could “save the validity of EPA’s transfer decision,” but the court found no argument that would justify the BiOp’s “failure to analyze, in detail, the likely effect of future development projects fostered by pollution permits on specific species.”

In considering a remedy, the court considered the considerable expense involved by Arizona in seeking delegation, the “somewhat murky legal environment” which Arizona, EPA and FWS faced in making their decisions, and the fact that Arizona had already issued many permits. The court said, “We cannot reverse the expenditure of those funds nor the issuance of those permits. We further recognize the administrative difficulties in transferring a program like pollution permitting from Arizona back to the EPA and very possibly back to Arizona again.” Nevertheless, the court found that other factors weighed heavily in favor of vacating EPA’s decision. The court cited the “tens of thousands of pollution permits” issued annually by Arizona pursuant to the delegation and concluded that “absent Section 7 coverage, we have no strong assurances that these permits will not allow development projects that are likely to jeopardize listed species or adversely modify their habitat.” It remanded the matter to EPA and the district court for proceedings consistent with the opinion.

In so doing, the court noted the conflicts among the circuit courts on the issue of whether or not ESA “provides a modicum of additional authority to agencies, beyond that conferred by their governing statutes, to protect listed species from the impact of affirmative federal actions. Other circuits... have considered the question. The reasoning of those opinions reflect an existing

intercircuit conflict on the question before us, with two circuits reading Section 7(a)(2) as we do and two concluding that Section 7 does not itself authorize agencies to protect listed species even when it is their own action that is jeopardizing them.”

The D.C. Circuit held in *Platte River* that Section 7(a)(1), which instructs agencies to “utilize their authorities,” does not “expand the powers conferred on an agency by its enabling act.” Relying on *Platte River*, the Fifth Circuit held Section 7(a)(2) does not permit “EPA to require a state to consult with FWS before issuing a water pollution permit.” Nevertheless, Judge Berzon wrote: “We do not find the D.C. Circuit and Fifth Circuit cases persuasive, as they do not reflect a full consideration of the text and history of Section 7(a)(2).” Further, he added, “The Fifth Circuit’s notion that the consultation and assurance aspects of the statute are independent is simply incorrect.”

Judge David Thompson wrote the dissenting opinion. He found the majority opinion to be that any action within a federal agency’s decisionmaking authority falls within the scope of Section 7(a)(2). But he read the case law as consistently recognizing that an agency may have decisionmaking authority and yet not be empowered to protect species. In such cases, like the one before the court, the decision did not represent “agency action” within the meaning of the ESA. To do otherwise, he wrote, is to impose a condition in clear conflict with the CWA’s expressed objectives. (*Defenders of Wildlife v. EPA*, 2005 U.S. App LEXIS 17983) It was anticipated that EPA or other defendants would seek an “en banc” review, where all judges sitting on the 9th Circuit Court would review the case.

Warren v. Maine

On October 28, the Supreme Court agreed to hear a case involving the meaning of “discharge,” with regard to Section 401 of the Clean Water Act (CWA), which gives states authority to certify, condition or deny certification with respect to any project that may or may not meet state water quality standards. On the Presumpscot River in Maine, a complex of five run-of-the-river dams owned by S.D. Warren were required by the Maine Department of Environmental Protection (DEP) to maintain certain dissolved oxygen levels and construct fishways as a condition of operation under the state’s Section 401 water quality certification authority. However, Warren contended that since the dams do not “discharge” any pollutant, the CWA did not apply, and the Court granted certiorari in order to address the question: “Does the mere flow of water through an existing dam constitute a “discharge” under Section 401...despite this Court’s holding last year in *Miccousukee* that a discharge requires the addition of water from a distinct body of water?”

According to Maine DEP spokesperson Dana Murch, “This is going to be the ball game for all states now.” The Court’s decision could affect the ability of state water quality agencies to require conditions intended to protect the environment, including any restrictions regarding flow and reservoir releases, water quality or other concerns.

The Hydropower Reform Coalition opined, “Without Section 401, states will be able to make recommendations to the federal manager (FERC), but not mandate actions to protect water quality standards.... The long-held practice is that a dam release constitutes a discharge, triggering Section 401.... By picking up the case, the United States Supreme Court may be signaling that it intends to overturn the consistent decision and limit state authorities.” (HRC News Release, October 28; www.hydroreform.org)

GAO Report

The General Accounting Office (GAO) released a report, dated November 30, on Federal Water Requirements: Challenges to Estimating the Cost Impact on Local Communities (GAO-06-

151R). It covered requirements under the Safe Drinking Water Act (SDWA) and the Clean Water Act (CWA) that are designed to protect the public health and welfare, as well as the integrity of our Nation's waters. According to the GAO Report, nationwide, there are roughly 53,000 community drinking water systems, 17,000 municipal wastewater treatment plants, and 7,000 communities served by municipal storm sewer collection systems. All these may be affected by federal water requirements. Many communities are increasingly voicing concerns about the financial burden imposed by these requirements – in particular, the projected costs of more recent regulations and their cumulative costs over time.

Over the years, various cost estimates had been developed. The Unfunded Mandates Reform Act of 1995 requires EPA to prepare a written statement identifying the costs and benefits of federal mandates contained in certain regulations. However, the act did not require EPA to identify the cumulative costs and benefits of multiple regulations. As the Congress considered legislation to provide more resources to communities to address regulatory costs and aging water infrastructure, it sought more complete information on federal requirements affecting local communities. GAO stated: "In this context, Congress asked us to determine the cumulative cost of federal water requirements. In conducting this work, we identified some major methodological challenges to developing complete and reliable cost information.... As requested, this report provides information on (1) key federal water requirements that local communities are subject to under the Safe Drinking Water Act and the Clean Water Act, (2) the extent to which existing studies provide information on the cumulative cost of such requirements to communities, and (3) the methodological challenges to developing reliable cumulative cost estimates attributable to federal water requirements."

Conservation

Cooperative Conservation

On October 12, Natural Resources Conservation Service (NRCS) Chief Bruce Knight and John Keys, U.S. Bureau of Reclamation Commissioner announced the signing of a five-year memorandum of understanding (MOU) "to accomplish efficient use and long-term sustainability of available water supplies for agricultural production, fish and wildlife protection, recreation and other beneficial uses." Knight said, "This partnership strengthens the commitment of USDA and the Department of Interior (DOI) to work together in support of cooperative conservation activities that improve water management on a regional, statewide and watershed basis." Through public-private partnerships and working collectively with other federal and state agencies, local governments, and private owners, the NRCS strives to improve stewardship of the nation's natural resources.

The agreement included: (1) support for locally-led cooperative conservation projects regarding efficient water management; (2) developing and implementing specific plans of action for cooperative conservation activities; (3) support for state and locally organized drought action teams; (4) identifying joint research needs and opportunities for field application of new technology; (5) joint USDA-DOI training, conferences, seminars and education programs; and (6) designated agency liaisons to communicate and coordinate activities at the national, regional, state and local levels.

Coachella Valley

During an October 14 visit to the Coachella Valley Water District (CVWD) in southern California, Bureau of Reclamation Commissioner John Keys presented a \$300,000 Water 2025 Challenge Grant Award to assist the district with its efforts to help area growers reduce their demand for agricultural irrigation water. "The Coachella Valley Water District is to be commended for its initiative in developing and promoting water saving technologies in the region," said Keys.

“Through these challenge grants, we are providing seed money for local, collaborative projects that increase the efficient use of our existing water supplies.” The grant was to provide about a third of the cost of a district program designed to conserve water through specific measures such as replacing more traditional surface furrow irrigation with drip irrigation. CVWD would test various measures and quantify the actual water savings. Under its Coachella Valley Water Management Plan, the district has a goal of reducing their agricultural water demand by 7%, existing golf course demand by 5%, and domestic demand by 10% over the next decade. These savings would help meet the District’s goal of ensuring the Valley has an adequate and reliable water supply for all its needs for 35 years.

“Saving water in agriculture means more water that can be stored in the valley’s aquifer, where it becomes available in the future to all types of consumers - other farmers, homes, golf courses, businesses,” observed Steve Robbins, CVWD General Manager. “This reduces potential conflicts, helps maintain lower costs and creates a more stable water supply.” CVWD’s overall goal is to conserve a minimum of 23,100 acre-feet of agricultural irrigation water annually. When this surface water is shifted to other uses, such as golf course irrigation, it reduces the amount of water withdrawn from ground water supplies. Saved water can also be returned to the aquifer through two pilot recharge projects in the lower valley.

Farm Bill

On December 21, the Senate amended and then approved 51-50 the Deficit Reduction Act of 2005. It took Vice President Dick Cheney, voting as President of the Senate, to break a 50-50 stalemate and pass the budget bill with \$39.7B in spending cuts, including \$2.7B from U.S. Department of Agriculture conservation programs. The House approved a related conference report by a 212-206 vote on December 19.

The conference report limited the new Conservation Security Program (CSP) to \$1.95B over the next five years, and no more than \$5.65B through 2015. CSP provides farmers “green payments” for conservation and environmental improvements while still working their lands. Environmental Quality Incentives Program (EQIP) spending would also be limited to \$1.27B for fiscal year 2007 through FY2009, and \$1.3B for FY2010. It extended spending authority for both programs through FY2011, which some farm interests believe may make it more difficult to make program changes in the 2007 Farm Bill.

Drought/Water Supply

National Drought Preparedness Act

On March 17, Rep. Alcee Hastings (D-FL) introduced in the new session of Congress the National Drought Preparedness Act of 2005 (H.R. 1386). In introducing the bill, Rep. Hastings stated, “The U.S. does not have a policy on drought. I wish I had just made a joke. The fact that we don’t have a drought policy, however, is a joke – and not a good one at that.” He continued, “Drought is not just an agriculture issue, nor is it only a water management issue. When droughts occur, forest fires erupt, small businesses close, crop yields decrease, and in many instances, people die.... It is time for America to move away from the costly, ad-hoc, and response-oriented approach to drought, and toward a more pro-active approach that focuses on preparation and planning.”

He summarized the four major goals of the bill. “First, the bill begins to move the country...toward a pro-active approach.... The new national policy will provide the tools and focus for federal, state, tribal and local governments to address the diverse impacts and costs caused by

drought. Second, the bill will improve the delivery of Federal drought programs. To ensure improved program delivery, integration and leadership, the National Drought Preparedness Act establishes the National Drought Council under the direction of the Secretary of Agriculture. The Council will provide the coordinating and integrating function for the more than 80 federal drought programs currently in existence.”

Rep. Hastings continued, “Third, the bill establishes new tools for drought preparedness planning.... [I]t will assist states, local governments, tribes, and other entities in the development and implementation of drought preparedness plans. The bill does not mandate state and local planning, but is intended to facilitate the development and implementation of drought plans through the establishment of a Drought Assistance Fund. Importantly, the bill also preserves state authority over water allocation. Fourth, the bill improves our forecasting and monitoring abilities. Under our legislation, the Drought Council will facilitate the development of the National Integrated Drought Information System [NIDIS] in order to improve the characterization of current drought conditions and the forecasting of future droughts, as well as provide a better basis to trigger federal drought assistance.”

He concluded, “Americans are hurting throughout this country today because of water shortages and prolonged droughts. Congress must act immediately, and time is of the essence.”

Senator Chuck Hagel (R-NE) joined Senator Pete Domenici (R-NM) in reintroducing similar legislation on April 14. In a press release, Hagel observed, “The severe drought that Nebraska and parts of the United States have endured demonstrates the direct need for a national drought plan. This is a responsible bill that will allow local, state and federal officials to coordinate drought mitigation efforts. We need to continue to be pro-active to lessen the toll that severe drought has on agriculture producers and the state’s economy.”

On April 15, special briefings on the legislation were held for and facilitated by House and Senate staff. They were sponsored by the Western Governors’ Association (WGA), WSWC, Southern Governors’ Association, Council of State Governments West, National Drought Mitigation Center (NDMC), National Association of Conservation Districts, and National Association of State Foresters. Don Wilhite, NDMC, discussed the definition of drought, current conditions and historical impacts. Jack Stults, WSWC and Montana Water Resources Division, discussed the state’s experience with drought, planning and preparedness, while Ken Crawford, Oklahoma Climatological Survey, explained the Oklahoma Mesonet drought monitoring system and National Integrated Drought Information System (NIDIS). Lastly, Shaun McGrath, WGA, summarized the key provisions of the legislation.

Water Supply Outlook/Snowpack

By the 1st of March, with only a month or so left in the prime snow season, dry conditions and above normal temperatures had resulted in a general decrease in snowpack. Further, the contrast in western snowpacks continued with many Pacific Northwest SNOTEL sites and snow courses with 30 or more years of record reporting March 1, 2005 snow water equivalents that ranked in the lowest 5% of all observations. On the other hand, approximately two dozen Southwestern and Great Basin SNOTEL sites and snow course reported amounts that ranked in the highest 95% of recorded observations.

Snowpack seasonal percentages continued to be very low in the Cascade Range in Oregon and Washington, ranging from 16%-50% of average. Central Idaho and western Montana also reported extremely low snowpacks, ranging from 40%-60% of average. Rocky Mountain snowpacks in Wyoming, Colorado and northern New Mexico range from 75%-150% of average. Above average

snowpacks continue throughout the Southwest, Great Basin and in central California, with 115%-160% of average in the central Sierras and northern Utah, while southern Utah snowpacks range from 170%-270% of average. Southwestern Colorado and northern New Mexico totals are in the 150%-160% range, and Arizona snowpacks are at 125%-160% of average.

Similarly, precipitation for the past week continued a persistent pattern over the last 4-6 months -- dry in the north and wet in the south -- with the dividing line running between Nevada-Utah-Colorado on the south and Oregon-Idaho-Wyoming on the north. The cumulative effect of the weather pattern was record or near-record dryness for Spokane, Washington; Boise, Idaho; and Great Falls, Miles City, and Havre, Montana -- dating back more than 120 years. Similarly, reservoir storage was low (with the exception of Washington), but was improving in the south, particularly in Arizona.

By April, winter storm systems continued to add snow in the Sierras of California, central Nevada, most of Utah, southern Colorado, northern New Mexico and parts of western Montana. Many snowpacks in the Southwest were near record highs, while dozens of snowpacks in the Pacific Northwest reported record lows, and projected streamflows mirrored these conditions. Further, as of April 1, reservoir storages for all western states except Washington, Arizona, and California were below historic averages.

By September northwest snowpack and streamflow figures for the water year continued at record lows. Recent dry weather had compounded the effects of an abnormally dry winter, leading to extreme drought conditions in central Washington, while severe to moderate drought afflicted much of the rest of western Washington, Oregon, Idaho, western Montana and Wyoming. Fire danger in eastern Oregon was very high. In much of the Columbia River Basin, seasonal precipitation for the water year was well below average at 50%-75%. With the end of the water year approaching, the NRCS SNOTEL system showed dozens of sites (with more than 20 years of record) ranked within the driest 5% of record along the Cascade Range of Washington and Oregon, as well as in eastern Oregon, northern Idaho and western Montana. The Southwest had some reprieve from drought, but reservoir storage levels were below average.

Climate Change

In announcing the release of a number of fact sheets on observed streamflow trends across the Nation, U.S. Geological Survey Associate Director for Water, Bob Hirsch, said in a May 5 news release, "Understanding streamflow trends is essential to effective management of the Nation's water supply and is critical to developing strategies that mitigate the potential negative impacts of floods and droughts." USGS scientists have determined, using data collection from streamgages since 1940, that streamflows in many areas are increasing, mostly during typically dry periods, mostly in the Upper Mississippi, Ohio Valley, Texas-Gulf and Mid-Atlantic regions (<http://pubs.water.usgs.gov/fs/2005/3017> and [fs/2005/3020](http://pubs.water.usgs.gov/fs/2005/3020)).

In the West, as much as three-fourths of the water supplies depend on snowmelt. The USGS has observed a trend toward an earlier average "center-of-volume," or the date on which half the annual flow has passed a streamgage -- of about nine days -- which is attributed to both late winter and early spring temperature increases and resulting changes in precipitation -- rainfall and snowfall. (<http://pubs.water.usgs.gov/fs/2005/3018/>). A similar shift of one to two weeks has been observed in New England streams (<http://pubs.water.usgs.gov/fs/2005/3019/>).

USGS notes these trends toward diminished snowpack and earlier snowmelt in western states may be related to global warming or to naturally occurring variability in winter and spring temperatures, but whatever the causes, they "threaten finely tuned water-resource and flood-

management systems and procedures in many western settings.” Therefore, they are a source of considerable interest and concern to water resource managers. The largest changes have been identified in the Pacific Northwest, but the trends also are present in the Sierra Nevada of California, in the Rocky Mountains, and through parts of British Columbia and southern Alaska.

Drought Relief

In an August 12 letter, hand delivered to Rep. George Radanovich (R-CA), Chair, House Resources Committee’s Water and Power Subcommittee and other key House and Senate members, the Western States Water Council joined the National Water Resources Association and Family Farm Alliance in calling for passage of H.R. 2925 and S. 648 to extend the current authority under the Reclamation States Drought Relief Act. The joint letter stated: “This authority provides many useful options for the U.S. Bureau of Reclamation during times of drought and if not extended, will expire in September 2005.” The legislation provides “expanded authority for the Bureau...for construction, management, and conservation measures to alleviate the adverse impacts of drought, including mitigation of fish and wildlife. The bill provides flexibility to meet contractual water deliveries by allowing acquisition of water to meet requirements under the Endangered Species Act, benefitting contractors at a time when they are financially challenged.”

It continues, “Additionally, the [legislation] allows the Bureau to participate in water banks established under state law; facilitate water acquisitions between willing buyers and willing sellers; acquire conserved water for use under temporary contracts; make facilities available for storage and conveyance of project and non-project water; make project and non-project water available for non-project uses; and acquire water for fish and wildlife purposes on a nonreimbursable basis. In short, [it] allows the Bureau the flexibility to continue delivering water to meet authorized project purposes, meet environmental requirements, respect state water rights, work with all stakeholders, and to provide leadership, innovation, and assistance to our collective members.”

The Council sent a similar letter of support to all western Senators and Representatives on April 22.

The House Resources Committee’s Subcommittee on Water and Power held a hearing on a number of bills on September 27, including H.R. 2925. Chairman Radanovich opened the hearing, and with respect to H.R. 2925 said, “We have experienced persistent drought throughout the West over the past decade, and the authority provided by this act has been critical in leveraging federal resources to help cities, states, and farmers manage their scarce water supplies and minimize the devastating impacts of water shortages.”

Deputy Director Tony Willardson testified in support of the bill on behalf of the Council, and was the only non-federal witness invited to specifically address the legislation.

Jack Garner, Acting Deputy Commissioner of the Bureau of Reclamation, as well as Deputy Director of Operations testified in support of H.R. 2925, which “allows Reclamation the flexibility to continue delivering water to meet project purposes and environmental requirements, respect state water rights, and respond to stake holders.... [W]e believe reauthorization of Title I is necessary.”

On November 16, the Senate Energy and Natural Resources Committee favorably reported S. 648, to extend the Reclamation States Emergency Drought Relief Act’s authorities through 2010. It was introduced by Senator Gordon Smith (R-OR). No further action had been taken on companion legislation, H.R. 2925, since the September 27 House Water and Power Subcommittee hearing.

Endangered Species Act

Grange v. National Marine Fisheries Service

On January 12, Federal District Court Judge Michael Hogan ruled coho salmon in the Klamath River Basin region had been illegally listed under the Endangered Species Act (ESA) as a threatened species, because the federal government failed to consider hatchery fish in its assessment. ESA protection of coho was a significant factor in the government's decision to shut off irrigation water to Klamath Basin farmers in the spring of 2001. "This victory came too late for the farmers who were pushed into bankruptcy and the businesses that were forced to close to protect fish that were never endangered," said PLF attorney Russ Brooks. "Our rivers and streams are teeming with salmon, yet the Klamath community was practically destroyed because of environmental politics run amok." The case of *California Grange v. National Marine Fisheries Service* (NOAA Fisheries), had been stayed by the judge pending environmentalists' appeal of his decision in *Alsea Valley Alliance v. Evans* (2001), which held that the federal government had illegally listed coho along the Oregon coast as threatened while excluding hatchery fish from counts. The Ninth Circuit Court of Appeals rejected that appeal in February 2004.

Judge Hogan did not set aside the illegal listing, leaving it in place while NOAA Fisheries completed its review of 26 west coast salmon listings, as a result of the *Alsea* decision. In June 2004, NOAA proposed a new hatchery policy, but it also simultaneously announced that it would result in the relisting—not delisting—of west coast salmon and steelhead populations. However, Judge Hogan has indicated that if a federal agency takes a specific enforcement action on behalf of the illegal listing coho which caused harm, those harmed could go to court and ask to have the federal action stopped. "In other words, as long as the federal government complies with Judge Hogan's ruling that the listing is illegal, there won't be a problem. But if they try to cut off the water again or take some other similar action, we'll be back in court," said Brooks. "This ruling should send a message to NOAA Fisheries that they cannot continue to circumvent the ESA to keep salmon listed when the prolific number of hatchery fish means salmon are not endangered. If NOAA does not accept the reality that the ESA does not distinguish between wild and hatchery fish before it issues its new hatchery policy, we will wind up back in court."

According to the Pacific Coast Federation of Fishermen's Associations (PCFFA) and spokesman Glen Spain, "The Grange case is at heart just a pretext for some disgruntled Klamath Basin landowners and irrigation water users to try to 'knock out' ESA protections which are forcing long overdue rebalancing of biased water allocations in the Klamath between upper and lower river communities.... [T]his case is really about water, and about whether landowners have any obligation at all to prevent the death of an entire river system, and all the fish within it, by putting water they have taken in the past back into the river."

Conservation Planning

On February 24, the U.S. Fish and Wildlife Service announced it was seeking proposals from states interested in acquiring land or conducting conservation planning for endangered species. Through the 2005 fiscal year, the Congress had appropriated more than \$70.5M. The money was to be awarded from the Cooperative Endangered Species Conservation Fund for a wide array of voluntary conservation projects for listed species, as well as for species that were either proposed or candidates for listing. States were required to have a current cooperative agreement with the Service and contribute 25% of the cost of projects.

"President Bush has made cooperative conservation the cornerstone of our efforts to protect and restore our nation's wildlife and its habitat," said Interior Secretary Norton. "These grants will

empower states and territories to protect vital habitat and work with local communities, private landowners and others to conserve threatened and endangered species.”

Amendment Proposals

On March 15, Rep. Dennis Cardoza (D-CA) reintroduced his “Critical Habitat Enhancement Act,” to improve the methods used by the U.S. Fish and Wildlife Service to designate a species’ critical habitat. The bill was identical to legislation that passed the House Resources Committee during the last Congress. “We need a system that enables the Fish and Wildlife Service to make more informed decisions on critical habitat designations and how to actually preserve a species,” Cardoza said. “In its current form, the Endangered Species Act is not meeting important recovery goals, with only 7 of 1300 species delisted in 30 years. This bill brings common sense to the ESA, making it more effective.” Budget shortfalls and litigation had complicated the designation process, as the Service had not had the resources to do its job, he concluded.

In response, private litigants had repeatedly sued the Service because it had failed to meet its deadlines. These lawsuits had then subjected the Service to an increasing series of court orders and court-approved settlement agreements. Compliance with these court actions consumed nearly the entire listing program budget, leaving the Service without the ability to prioritize its activities or to direct scarce listing resources to program actions most urgently needed to conserve species.

The bill would redefine the designation process in order to reduce litigation by private interests and truly protect and conserve species. “Congressman Cardoza’s legislation addresses what is probably the most widely agreed upon problem with the ESA,” said House Resources Committee Chairman Richard Pombo. “The unintended consequence of the current critical habitat designation process is that it has relegated our biologists to courtrooms and legal chores instead of hands-on species recovery work in the field. Correcting this problem will be one of the first and most important steps in our collective effort to update the Act for the 21st century and strengthen its results for species recovery.”

Specifically, Cardoza’s legislation would extend the timeline for designating critical habitat for a listed species, giving more time to the Fish and Wildlife Service to study the needs of the species and appropriately designate critical habitat. The bill would also require the Service to consult with local entities when designating lands for protection and require the consideration of the economic effects of critical habitat in their analyses. “Fostering a continued sense of community involvement and participation is an important and often overlooked component of species protection,” Cardoza said. “Information is the key – the more data, the better informed the decision.”

On May 4, the House Resources Committee’s Subcommittee on Water and Power, chaired by Rep. George Radanovich (R-CA), held an oversight hearing entitled, “Stabilizing Rural Electricity Service Through a Common Sense Application of the Endangered Species Act (ESA).” In a press release prior to the hearing, Committee Chairman Richard Pombo (R-CA) said, “Residents in Western states suffer from especially high energy costs due to problematic applications of the ESA. It’s important that we discuss the effects of federal policy on energy deficient regions in this country and take steps to increase the stability of those areas.” Radanovich added, “Everyone wants to protect endangered species, but we need to improve the way the Endangered Species Act is being carried out. At a time when America needs domestic energy supplies and grid reliability is questioned, we need to figure out a better way of ensuring the same level of protection while not breaking the backs of electricity ratepayers. Finding common sense alternatives is the goal of this hearing.”

The federal Bonneville Power Administration (BPA) supplies power to many customers in the Northwest and California. BPA estimated that over the previous five years, its operating costs related to the ESA had been nearly one-quarter of its total expenses. During the summer of 2005, BPA lost \$77M in foregone hydropower revenues releasing water primarily to protect a specific population of sockeye salmon. BPA estimated the spills resulted in 20 more returning adults, or \$3.85M per targeted fish.

Rep. Greg Walden (R-OR) observed, "As we work to strengthen and update the 30-year old Endangered Species Act, we must take into consideration the important balance between conservation and the production of electricity through clean, renewable hydropower and other means. Ratepayers in the Northwest currently pay \$600 million per year beyond their electricity costs to the Bonneville Power Administration for species and habitat conservation projects. While the health and well-being of species in our region is most important, we also have a responsibility to make sure that these projects, and those like them throughout the nation, are driven by sound science and decisions that take into account the viability of both species and communities."

On May 17, House Resources Committee Chairman Pombo released a report, Implementation of the Endangered Species Act (ESA) of 1973, prepared at his request by Committee staff. Staff reviewed Federal Register notices, Fish and Wildlife Service (FWS) and National Marine Fisheries (NMFS) reports to Congress, agency expenditures, critical habitat designation economic impact assessments, and agency regulations and recovery plans. Staff also discussed ESA implementation with numerous federal, state and local officials.

An executive summary stated that "...one of the most debated aspects of ESA implementation continues to be whether the ESA is effectively conserving endangered and threatened species.... [A]fter three decades more progress should be demonstrable through species that have recovered and been delisted. Even if a species has increased in numbers or distribution or the threats facing the species have been reduced, if it has not been delisted on the basis of recovery, the ESA's prohibitions and regulations remain applicable and the ESA should not be a 'one way street.'"

The Endangered Species Act's less than one percent success rate for species recovery is a well-documented and readily-available statistic, but the status of the remaining species on its list has not been as clear until now," Chairman Pombo said. "This exhaustive review of government data makes it clear the vast majority of these species have not improved under implementation of current law. The ESA has not achieved its original intent of recovering species. In fact, there is little evidence of progress in the law's 30-year history. After reviewing this body of agency information on the Act's implementation over the years, no reasonable individual can conclude that the ESA is sustainable in its current form. It checks species in, but never checks them out."

The report also addressed expenditures by federal, state, and private parties on species listed, but concluded that while the current program clearly costs billions of dollars, insufficient economic information is collected to reasonably determine the true cost of the law.

According to the report, the FWS had found that the designation of statutory critical habitat provided little additional protection to most listed species, but was consuming a significant portion of its budget. Moreover, under the present system, litigation rather than biology, drove FWS work priorities. There were 34 active lawsuits involving 48 species, 40 court orders covering 8 species, and another 36 notices of intent to sue involving 104 species.

"The ESA is obviously in need of a legislative update that will focus the law on strengthening results for species recovery," Pombo said. "This report will be an invaluable guide as Congress

considers the best way to do just that. It has certainly become a question of how we improve this law, not a question of if.”

On May 19, the Senate Environment and Public Works Committee’s Subcommittee on Fisheries, Wildlife and Water held the first hearing on the Endangered Species Act (ESA) under new Chairman Lincoln Chafee (R-RI). He opened the hearing saying, “Today, we begin taking a look at the law that was crafted over 32 years ago with the goal of protecting and recovering threatened and endangered species. If one measures the success of the ESA by the number of species that have gone extinct while the law has been in place, only 9 out of more than 1,200 U.S. listed species have gone extinct since 1973. This is good news. We are slowing species extinction for now. But at the same time, what is happening to successfully recovering species and bringing them back to sustainable populations? Critics of the ESA declare that we must do a better job at streamlining the Act and recovering species. We find ourselves in a position to take a hard look at the effectiveness of the ESA and how successful it has been at recovering species and bringing them back from near extinction.”

Further, he announced, “I am also pleased to announce that Senators Inhofe, Jeffords, Clinton, Crapo, and Lincoln have joined me in sending a request to the Keystone Center to initiate a stakeholder dialogue on the issue of critical habitat. As one of the Act’s most debated and litigated provisions, my colleagues and I are beginning to explore new ways to address this issue. I look forward to the outcome of the Keystone Dialogue.”

On June 22, Chairman Radanovich held another ESA oversight hearing this time on Environmental Regulations and Water Supply Reliability that focused on the effect of the ESA on water supplies. “Everyone wants to protect endangered species, but we need to improve the way the Endangered Species Act is being carried out,” said Radanovich before the hearing. “Water is the common thread that bonds the economic and social fabric of our communities. Throughout the West communities are threatened daily with severe water problems and it’s our responsibility to help find solutions.”

According to a Committee press release, the effect of ESA implementation has led to water shut-offs in the Klamath River basin, costly litigation, and millions of taxpayer dollars spent in vain. The most apparent effects are the costs that are directly passed on to water consumers.

The hearing was one in a series held throughout the year around the country under Pombo’s direction as part of a renewed effort to improve and update the Endangered Species Act.

The Senate Environment and Public Works Committee’s Subcommittee on Fisheries, Wildlife and Water held a hearing on September 22 to examine the role of states, tribes, and local governments under the Endangered Species Act. Governor Owens of Colorado and Governor Freudenthal of Wyoming submitted written testimony on behalf of the Western Governors’ Association (WGA). Witnesses included the State of Colorado, the National Association of Counties, and the Northwest Indian Fisheries Commission, as well as the International Association of Fish and Wildlife Agencies, the Peregrine Fund, and the Wildlife Management Institute of the University of Oregon. A common theme from the witnesses was that the states, tribes and local governments want to be equal partners in protecting and recovering species. Subcommittee Chairman Lincoln Chafee (R-RI) and Ranking Minority Member Hillary Clinton (D-NY) were seeking greater consensus before proposing ESA amendments, touting the participation of the Keystone Center in work to begin the following month.

On the House side, Resources Committee Chairman Richard Pombo (R-CA) introduced H.R. 3824, the Threatened and Endangered Species Recovery Act (TESRA), on September 19. He held

a hearing on the bill on September 21, and it was marked up and approved the next day on a 26-12 vote. Pombo said, "Having this much bipartisan support coming from the committee sends a very strong signal to the rest of the House."

H.R. 3824 would amend ESA provisions relating to the listing of endangered and threatened species, procedures for making such determinations, and the role of states and private property owners in the process. It defined "best available scientific data." It would repeal the authority to designate critical habitat and direct the Secretary of the Interior to develop and implement recovery plans for endangered or threatened species and to establish recovery teams giving priority to species that will most likely benefit. It would also authorize the Secretary to: (1) enter into species recovery agreements and species conservation contract agreements with persons, other than federal or state governments, for species protection and conservation activities; and (2) make grants to promote the voluntary species conservation by private property owners. The bill would also eliminate the rarely used Endangered Species Committee and the process for granting exemptions from ESA protections.

On September 29, the House approved H.R. 3824, by a 229-193 vote, after defeating an amendment in the nature of a substitute offered by Rep. George Miller by a 206-216 vote. A number of amendments were made to the bill reported by the House Resources Committee on September 27. Rep. Richard Pombo (R-CA) offered an amendment that was adopted which made a number of technical changes to clarify certain provisions and address issues related to science, the definition of "jeopardy," consolidation of ESA-related programs, and review of protective rules. It would also allow actions authorized under Section 10 permits to be carried out without duplicative consultation, direct federal land management agencies to survey the value of such lands for recovery of species within two years, define Section 7 consultation as equivalent to Section 101 incidental take authorization required under the Marine Mammal Protection Act for building docks, and direct the federal power marketing administrations to include in their monthly billings to firm power customers their share of the direct and indirect costs of ESA compliance.

Some of the more controversial provisions of the bill provided for compensation for private property and livestock losses, due to ESA implementation. Pombo said, "During debate, the entire House of Representatives seemed to agree the ESA is in need of updates and improvements. It's incredible how far we have come. But what surprised me most today was the strong ideological differences about whether or not homeowners should be compensated when their property is taken, as the Fifth Amendment of the Constitution requires. Upholding this right and partnering with the landowner is the only way we are going to improve the ESA's failing results for recovery. This legislation does just that."

On December 15, Senators Mike Crapo (R-ID) and Blanche Lincoln (D-AR), who co-chaired a bipartisan ESA working group, introduced the Collaboration for the Recovery of the Endangered Species Act (CRESA). The bill, S. 2110, would encourage species conservation and recovery with more incentives for private landowners and states. It would, for the first time, provide tax breaks and allow conservation banking to protect species. Several states have successfully used banking as a mechanism to encourage voluntary conservation efforts. The banking provision is an innovative market program that allows landowners to profit from conservation efforts through use of conservation credits. The bill would allow the federal government to prioritize its resources to get funding to the species most in need. Further, it would incorporate local input on recovery plans and species recovery teams. "We must decrease the conflict inherent in present efforts to speed recovery," Crapo said. "Collaboration and incentives offered to property owners will be a faster route to recovery of species than litigation in the courts. CRESA allows for innovation, flexibility, and the collaborative involvement of many parties, which have proven to be more effective in recovering species."

“This is a constructive, bipartisan effort to update a 30-year-old law which has increasingly slowed the recovery of endangered species,” Lincoln said. “By encouraging greater involvement between land owners and environmentalists, it is my hope that we can minimize litigation and enhance recovery.”

Indian Water Rights

Senate Water Conference

At the April 5th Senate Energy and Natural Resources Committee Water Conference, Craig Bell, WSWC Executive Director, represented the Council’s recommendations regarding Indian and Federal reserved water rights. He said, “The settlement of Native American water claims is one of the most important aspects of the United States’ trust obligation...and is of vital importance to the country as a whole. In supporting settlements, we have worked closely with the Western Governors’ Association,” which has endorsed the proposals we are recommending. He continued, “We wish to commend the Congress for its support of negotiated settlements. These approved settlements have helped to save untold millions of dollars of public and private monies through avoidance of prolonged and costly litigation. A key component of this success has been the Administration’s efforts to establish and maintain negotiation teams for both achieving and implementing settlements. Unfortunately, the level of funding for these negotiation teams is currently inadequate. We urge Congress to provide the necessary funding to facilitate increased tribal participation.... Funding of water settlements should be a mandatory obligation of the United States government. That obligation is analogous to, and no less serious than, the obligation of the United States to pay judgements which are rendered against it. We have provided draft legislative language to accomplish this purpose.”

He added, “We believe that settlement of federal non-Indian reserved rights should also be supported. Such settlements offer several advantages. A principle means of facilitating settlement of such rights is within the context of their adjudication in state proceedings. Unfortunately, the Supreme Court held in 1992 that the federal government is exempt from paying filing fees to support these adjudications. We urge Congress to reverse the effect of that holding, so that the federal government pays filing fees for its claims in state general adjudications to the same extent as private water users.”

Senator Jeff Bingaman (D-NM) noted the strong statements regarding the lack of meaningful participation in Indian water right settlement negotiations by the U.S. Department of Justice, and also lamented changes in representation in the Department of Interior asking, “How do we get consistent Interior representation?” Senator Murkowski expressed disbelief over the 30-35 years New Mexico has been dealing with some water right adjudications and settlement negotiations, and asked about the need for funding. Domenici noted the recent Arizona water rights settlement will be financed with specific revenues [the Colorado River Dam Fund], as part of the regular budget process. However, he emphasized that Congress does not intend to take a proportionate amount for settlements out of Interior’s budget for other Indian programs.

Navajo Nation Settlement

The New Mexico Interstate Stream Commission approved a proposed water rights settlement agreement with the Navajo Nation on January 12, at a public meeting held in Farmington. The Navajo Nation Council approved the settlement agreement on December 29, 2004 by a 62-18 vote. “The agreement determines what water rights the Navajo Nation owns and in what amount in the San Juan Basin. It is good for non-Indian water users because it draws to a close years of uncertainty

with regard to water rights claims. It is good for the State of New Mexico because it avoids years of costly litigation to adjudicate Navajo Nation water rights claims and it does so without compromising our Compact obligations, while protecting current water uses within the basin,” said State Engineer John D’Antonio.

Interstate Stream Commission Chairman Jim Dunlap said, “The settlement agreement has been refined since the draft we reviewed in August, and it has taken into account public comment that was received. The agreement is fair and represents compromises between all parties involved.” He added, “The risk to all parties of not approving this document is significant.” Once executed by the Governor, the New Mexico Attorney General, and Navajo Nation officials, the settlement agreement would be forwarded to New Mexico’s Congressional delegation to introduce legislation to approve the settlement and related authorizations for projects and funding. Once enacted into law, the settlement agreement and a settlement contract with the U.S. Secretary of the Interior would be executed.

The settlement agreement provided both for the adjudication of the Navajo Nation’s water rights and the associated water development projects for the benefit of the Navajo Nation in exchange for a release of claims to water that could potentially displace existing non-Navajo water users in the basin. A proposed partial final decree to adjudicate the rights of the Navajo Nation to use and administer water in the basin then would be submitted to the San Juan River Adjudication Court.

The settlement agreement specified a number of deadlines for action: (1) the settlement act must be enacted into law by December 31, 2006; (2) the partial final decree must be entered by the court in the San Juan River Adjudication by December 31, 2010; (3) a joint hydrographic survey report must be completed by December 31, 2011 for the tributary areas; (4) the supplemental partial final decree for tributary areas must be entered by the court in the San Juan River Adjudication by December 31, 2013; and (5) certain project construction and funding milestones are also to be achieved by specified completion dates.

Aamodt Settlement

The U.S. Interior and Justice Departments balked at paying most of the estimated \$280M cost of a regional water system as part of the proposed Aamodt water-rights settlement. The system would supply non-Indians, which in turn would be required reluctantly to cap their private ground water wells, to protect tribal water uses. Bradley Bridgewater, a U.S. attorney, said headquarters officials now opposed the settlement. Interior was willing to provide \$11M. U.S. District Judge Martha Vazquez declared, “I’m having trouble figuring out what the government’s position is. I thought they had agreed to the settlement.” She threatened to set a March 31 trial date if no settlement was reached. “Where we go from here remains very much up in the air,” said Nambé Pueblo Indian attorney Scott McElroy. Senator Pete Domenici said, “It is my sincere hope that the administration will reconsider its position and will continue to work with the respective parties to determine an appropriate and realistic federal contribution to these important settlements.”

Nez Perce Settlement

At a January 15 meeting of the North Side Canal Company (NSCC), in Jerome, Idaho, Norm Semanko, Executive Director of the Idaho Water Users Association and a WSWC member, reported that the Nez Perce settlement would waive the Nez Perce Tribe’s claim to virtually all the water in the Snake River forever as part of the Nez Perce Settlement. Since the tribe has claimed an 1855 priority date, virtually all the surface and ground water users on the Snake Plain would be affected. The tribe would be granted an on-reservation consumptive use claim and rights to use streams and

fountains on federal lands, but these new rights cannot result in injury to any other water rights. "From a water-rights perspective, it's a very good agreement," Semanko said.

Once the Idaho Legislature acted and the Nez Perce Tribe gave its formal approval, a 30-year biological opinion under the Endangered Species Act must be issued by March 31. Some at the meeting questioned the use of so much water to flush anadromous fish through the system, when the water could be used to recharge the Snake Plain Aquifer. "It's not a perfect agreement," Semanko said, "but in terms of protecting water rights it's a no-brainer." Without the settlement, everyone's water rights are under a cloud. Ted Diehl, NSCC Manager, said that getting the agreement through the Legislature was a high priority. "We certainly need it. We need it to protect our water right."

On March 3, the Idaho House passed three bills -- House bills 152, 153 and 154 -- bringing the proposed multimillion dollar settlement between the Nez Perce Tribe, the state and federal government closer to fruition. The bills would now move to the Idaho Senate. Rep. Dell Raybould told lawmakers that much of the opposition to the agreement was based on bad information. "This is good for the state of Idaho. It's good for the citizens of the state of Idaho. And I believe this body has an obligation to uphold this agreement." Nearly 80% of his colleagues agreed, deciding to settle the matter once and for all, avoiding expensive and protracted litigation, while protecting irrigators in the Upper Snake River Basin and some loggers and landowners in the Clearwater and Salmon river basins.

The agreement gave the Nez Perce Tribe annual rights to 50,000 acre-feet of water in the Clearwater River and \$80M cash, as well as land in return for dropping claims to nearly all the water in the Snake River and its tributaries. State and federal agencies also pledge millions for fish habitat and environmental improvements. Idaho and the Nez Perce needed to ratify the settlement, which the Congress already approved, by March 31.

On March 29, the Nez Perce Tribal Executive Council approved the Snake River Basin Adjudication agreement, and Idaho Governor Dirk Kempthorne called Chairman Anthony Johnson to commend him for his leadership. He observed, "This was the final step in a long journey. Think about the significance of this agreement, which resolved issues from... the 1850's and for decades to come will provide certainty and predictability for all of us, while preserving state water rights. [N]ow we know we can begin implementing the...terms of the historic agreement."

Lummi Reservation

The Lummi Indian Nation in Washington brought suit in the federal district court to limit or preclude groundwater withdrawals by non-Indians, fearing that overdrawing would lead to an intrusion of saltwater and corruption of the isolated aquifer. Non-Indian countered in order to secure the water rights they claim accompanied the transfer of title when they or their predecessors-in-interest bought the land from Lummi landowners who were allotted land individually under the Treaty of Point Elliot. Each side proffered a different "primary purpose" for the creation of the Reservation on which to base the implied federal reserve water rights.

Following the lead of the Arizona Supreme Court decision In re General Adjudication of All Rights to Use Water in Gila River System & Source, 35 P.3d 68 (Ariz. 2001), the Federal Government and Lummi Nation asserted the need for a permanent homeland as the primary purpose of the Treaty and under such a broad purpose, asked the court to reserve enough water for all domestic, agricultural, community, commercial and industrial purposes. The State of Washington argued for limiting the primary purposes to domestic and agricultural uses and applying the Practicably Irrigable Acreage (PIA) standard for quantifying the Indian reserved right.

The Federal District Court in Seattle found sufficient grounds for rejecting the homeland theory. First, the court noted, no federal court has ever determined the quantity of a federal reserved right by looking at the modern activities of the Indians on a particular reservation. Second, the homeland theory begged the question of what water was actually necessary to make a homeland “liveable.” Finally, and most significantly, the homeland purpose was deemed contrary to clear Ninth Circuit precedent. “The appropriate inquiry under federal law,” stated the court, “requires a primary purpose determination based on the intent of the federal government at the time the reservation was established.” Additionally, activities that are merely “important” to the Tribe are not sufficient for finding a primary purpose in Ninth Circuit jurisprudence.

Having adopted agriculture and domestic uses as the primary purpose of the Treaty, the court then ordered the PIA standard to be applied in quantifying the reserved right for agriculture. The amount reserved for domestic use was to be determined independently from the PIA.

In addition to ruling on the “primary purposes” issue, the district court also ruled that Indian reserved rights under the Treaty of Point Elliot were owned individually by members of the Lummi Tribe and were transferable to non-Indian successors-in-interest when the land was sold. A non-Indian user was subject to state law doctrines of due diligence and “use it or lose it” for purposes of continuing or perfecting the transferred reserved right. Consequently, the Tribe only regained whatever right exists through continued use when it reacquired land from non-Indians; the Tribe did not regain the original reserved right.

U.S. v. Nevada State Engineer

On November 21, the U.S. Ninth Circuit Court of Appeals ruled on a narrow issue involving the Pyramid Lake Paiute Tribe’s water rights as established under the 1944 *Orr Ditch* Decree. The Tribe sought to temporarily change its irrigation use to an instream use, including that amount of water previously allowed to be diverted to cover transportation losses. The Nevada State Engineer allowed the change in the nature of use, granting the Tribe the majority of its request to transfer its right to an instream use to benefit its Pyramid Lake fishery, but did not allow the Tribe to transfer claims for transportation losses which, “in the view of the Engineer could not be transferred to a use that did not entail such losses.” The State Engineer’s December 6, 2002 ruling was appealed in January 2003 by the Truckee-Carson Irrigation District (TCID), which also invoked an automatic stay on change applications under Nevada water law (upon a timely appeal and the posting of a required bond).

The U.S. District Court of Nevada decided the case on March 9, 2004 -- on the merits of the underlying appeal from the State Engineer’s ruling. The court largely affirmed the Engineer, upholding his decision. Parties on both sides appealed. TCID’s appeal was dismissed pursuant to a stipulation of the parties, leaving only the Tribe and the United States. While the issue involved a temporary transfer that ended in November 2004, as the issue “will almost certainly arise again,” the Ninth Circuit agreed to hear the appeal under an exception to mootness for cases “capable of repetition, yet evading review.” As the court determined, “Temporary transfer applications may involve changes in water use that are of brief duration such that the period will inevitably expire before any appeal can be heard.” With respect to the appropriate standard of review, the court noted, “We uphold the State Engineer’s legal conclusions as long as they are not contrary to law. Although we consider the State Engineer’s interpretations of Nevada statutes ‘persuasive,’ they are not controlling.” The Ninth Circuit chose to review *de novo* the district court’s conclusions.

The court agreed the *Orr Ditch* Decree allowed owners of water rights to change the “place, means, manner or purpose of use of the waters to which [the owner is] so entitled,” as long as they did so “in a manner provided by law.” The *Orr Ditch* Decree granted the Tribe’s Claim No. 1 to

14,742 acre-feet of water to irrigate 3,130 acres of reservation bottom lands, as well as some 15,345 acre-feet of water to irrigate 2,745 acres of bench lands. "These maximum figures include an estimated amount of water that will be lost in the process of transporting the water from the river to the irrigated lands," which the Decree specifically set at an estimated 15% for Claim No. 1. The State Engineer therefore granted about 85% of the Tribe's transfer request (but only about 73% of the request under Claim No. 2).

The court noted that the estimates for transportation loss were based on the assumption that the water would be used for irrigation, and that both the district court and the State Engineer referred to the portion of the water right actually delivered to the land as the "water duty." The Ninth Circuit added that the State Engineer relied on the Decree's "no injury" provision, finding that there would be a "potential of impact to storage and consequently injury to other water right holders" if the transportation loss portion were included. The State Engineer did not resolve the issue of whether the Tribes' water rights included the water allocated for the transportation loss. Citing *Adair*, the court also noted that "reserved water rights are established by reference to the purpose of the reservation rather than any actual beneficial use of water." The district court affirmed the state engineer's ruling on the grounds that "...the Tribe is entitled not to the total amount of water it is entitled to divert, but only to the maximum amount...it is permitted to apply to the land." The Tribe had argued that it had an "unqualified entitlement to divert water up to the overall maximum."

The Ninth Circuit disagreed, affirming the district court's decision that the maximum diversion allowances were only estimates, and that "the allowance or flow as fixed by this decree for application to the land shall control." While the latter amount "remains constant," the court said, "...if we were to agree with the Tribe that it is entitled to transfer to instream use the water allocated to transportation loss for irrigation, we would have to direct the State Engineer to make a year-by-year assessment of how much water, under current weather and soil conditions, would actually be lost if the Tribe used its water right to irrigate its lands.... Such a rule would be difficult to administer and would create considerable uncertainty."

The court also referred to the *Alpine Land Decree*, which explicitly excluded transportation loss from the amount of water that may be transferred, and *Arizona v. California*, which established priorities and decreed that if water was used for non-consumptive purposes, the amount used could not "exceed the consumptive use that would have resulted."

River Basins

Cal-Fed

According to an editorial printed in the Stockton Record of June 9, "The disarray and disillusionment surrounding the Bay-Delta Authority and CALFED continue. Funding limitations that have seriously jeopardized the state-federal program's effectiveness have been followed by a leadership exodus. Within days of each other, director Patrick Wright and lead scientist Johnnie Moore announced their resignations in May." It continued, "State and federal funding has all but dried up. Without money, it has been difficult for CALFED administrators to achieve their goals of restoring the San Joaquin Delta and assuring a secure, reliable water supply. The state Legislature withheld \$100 million this year. Lawmakers have complained the program lacks focus and a clear sense of direction."

The editorial further stated: "When the agency was created in 1996, the goal was to end the state's long-standing water disputes -- many of them pitting interests in Northern California against those in Southern California. The idea was to establish some common ground and consolidate power

by combining regional groups and individuals. Wright was the agency's director for all nine years of its existence, but there had been limited progress. He was well-thought-of, but a change of leadership could be a positive thing. Joe Grindstaff, chief deputy director for the state Department of Water Resources, will be the acting director. Gov. Arnold Schwarzenegger has asked that a 10-year plan for CALFED be developed by November 1."

Colorado River Basin

Department of Interior Decision

On May 2, U.S. Department of Interior Secretary Gale Norton affirmed her ability to control water releases from Lake Powell, and adjust annual operation plans, but announced she had determined that an adjustment was not warranted at that time. The decision followed a mid-year review, requested by Upper Colorado River Basin States, which the Secretary included in the 2005 Annual Operating Plan for the Colorado River Reservoirs. Lake Powell and Lake Mead are the two major reservoirs. Lake Powell storage ensures the Upper Basin States can meet their 7.5 million acre-foot (Maf) water delivery obligation to the Lower Basin States, under the 1922 Colorado River Compact, and help fulfill a 1.5 Maf 1944 U.S. treaty obligation to Mexico.

Water released from Lake Powell, which is on the Arizona-Utah border, is stored at Lake Mead on the Arizona-Nevada border for delivery to the Lower Basin States and Mexico. However, the drought had strained the region's water supply, prompting discussions over the use of water from the river, and raising legal questions. "Who is responsible for supplying Mexico's water?" Given the Secretary's decision, by the end of the 2005 water year, it was anticipated that about 8.23 million acre feet (Maf) of water will have been released from Glen Canyon Dam. Upper Basin States, fearing dropping levels could threaten future power production and their ability to meet their own needs and delivery obligations for Lower Basin States, had asked Norton to reduce current releases after the Seven Basin States could not reach any agreement.

Norton explained she decided to maintain Colorado River water releases from Lake Powell at their scheduled level for the next five months because drought conditions in the Colorado River Basin had eased. The National Weather Service's April 15 forecast of April-July snowmelt indicates that the most probable Upper Basin runoff projection was for 106% of average. Lake Powell's water level was expected to rise about 50 feet to some 48% of capacity or about 10 Maf, and Lake Mead was expected to reach 57.5% of capacity or about 13 Maf (by September 30, 2005). Further, with "average" runoff next year, both reservoirs were projected to store nearly identical amounts of water by Sept. 30, 2006.

However, the Secretary also emphasized that it was premature to conclude from the 2005 water year that the drought in the Colorado River Basin has ended. "We remain concerned about drought in the basin and therefore will propose a mid-year review in the 2006 Colorado River Annual Operating Plan if conditions warrant. We need to continue close monitoring of reservoir levels and releases in the 2006 water year." Norton's decision came after consulting with the Colorado River Management Work Group, which represents the Seven Basin State governors, federal agencies, academic and scientific communities, environmental groups, the recreation industry, hydropower contractors, and the public. Secretary Norton noted that she had urged the Basin States to develop a consensus plan on managing the river during drought, including reservoir levels and releases from Lake Powell. However, the states were unable to reach an agreement.

The Secretary notified the states' governors of her decision on May 2, through an official "Letter of Transmittal." She also informed the governors that Interior would convene a meeting of the Colorado River Management Work Group, by May 31, to determine the best way to address

issues in the Colorado River Basin and improve coordinated management of the reservoirs due to present and future droughts. She said, "At a minimum, these consultations should address the development of guidelines for Lower Basin shortages and conjunctive management of Lake Powell and Lake Mead."

1944 Mexican Treaty

A coalition of environmental and Mexican groups filed suit in U.S. Federal District Court in Las Vegas, challenging a multimillion-dollar U.S. Department of Interior project to line 23 miles of the All-American Canal and send the "saved" water to San Diego County. Farmers in the Mexicali Valley have relied on pumping of seepage from the All-American Canal to irrigate their crops for five decades. "We firmly believe that we have the right to use this water," said Victor Hermosillo, a former Mexicali mayor. The City of Mexicali is the capital of Baja California. According to Federico Prieto Gaxiola, President of Mexicali's Economic Development Council, "This will cause irreversible damage to our city." The Mexicans have joined two California environmental organizations, Citizens United for Resources and the Environment (CURE) and Desert Citizens Against Pollution to challenge Interior's action.

R. Gaylord Smith, a San Diego attorney who is the lead trial lawyer for the groups, said the project violated western water law. "In the western part of the United States, we have a rule about water called 'first in time, is first in right.' That law applies here." Further, the lawsuit claimed the project would harm wildlife on both sides of the border by drying up Mexican wetlands that are fed by canal seepage. The U.S. government "never looked at the socioeconomic impacts of what will occur by this action in Mexico," says Bill Snape, a CURE attorney.

However, U.S. water officials pointed out the water carried by the All-American Canal belonged to California, part of California's annual 4.4 million acre-foot allocation under the 1922 Colorado River Compact between the seven U.S. basin states. "The water that we're saving through lining the canal is water that is allocated to California, not water that is allocated to Mexico," said Gordon Hess, Director of Imported Water for the San Diego County Water Authority. "We believe that each side has the right to manage its resources as efficiently as possible." The water saved through the lining project could supply 134,000 households.

For years, lining the canal, which once meandered through the U.S. and Mexico, has been an issue discussed by U.S. and Mexican officials through the International Boundary and Water Commission. The U.S. had offered to help Mexico improve irrigation practices in the Mexicali Valley to reduce water use, but would not delay the lining project, with construction expected to start early in 2006 at an estimated cost of \$180M-\$293M.

Klamath River Basin

Salmon

In an important victory for the Klamath Water Users Association (KWUA), Judge Sandra Armstrong, U.S. District Court, Northern California, dismissed a case filed by environmental activists and the Yurok Tribe against the Bureau of Reclamation in relation to the die-off of salmon on the lower Klamath River in 2002 on the basis of jurisdictional issues. The Yurok Tribe contended that the Bureau violated their fishing rights in 2002 by providing inadequate mainstem flows, as a result of its operation of the Klamath River Project. Klamath Project water users intervened and filed a motion to dismiss the case. The federal government and attorneys representing KWUA denied that operation of the Klamath Project harmed the Tribes' fishery, and further asserted that the court lacked jurisdiction to hear the Tribes' breach of claim, that the breach of trust claim was moot

and not justifiable, and that the Tribes' claim should be dismissed. On January 13, Judge Armstrong agreed and granted the motion to dismiss the case as "moot," canceling a February 14 trial date. (Pacific Legal Foundation Press Release, January 14, 2005)

KWUA Executive Director Dan Keppen, said, "We are sympathetic towards the tribes' needs, and our attorneys tried to work with all interested parties to try to reach a win-win position in this case. Litigation will not solve their concerns. There are other ways to constructively reach a remedy that addresses all the watershed needs without needless lawsuits and divisive press attacks." Water users are hopeful that the 2003 final Klamath River report of the National Research Council and the 2004 signing of the Klamath River Watershed Coordination Agreement would provide a basis for developing consensus and solutions.

A written order from Judge Armstrong was expected soon, and the Yuroks could appeal it to the Ninth Circuit.

Klamath Irrigation District v. United States

In a decision handed down August 31, the U.S. Court of Claims denied Klamath Basin irrigators' allegations under the Fifth Amendment of the Constitution that their water rights were taken and they were thus entitled to just compensation when the Bureau of Reclamation (BOR) reduced their water deliveries in 2001 in order to preserve flows for endangered and threatened species under the Endangered Species Act (ESA). In so doing, the Judge Francis Allegra, writing for the court, criticized an earlier decision of the same court written by another judge awarding damages in *Tulare Lake Basin Storage District v. United States* 49 Fed. Cl. 313 (2001). There the court, facing similar circumstances, found a "physical taking" requiring just compensation. Judge Allegra found the earlier decision "wrong on some counts, incomplete in others, and, distinguishable, at all events." (2005 U.S. Claims Lexis 256)

The court discussed the obligation of the BOR to assure that its operations in relation to the Klamath Project did not result in jeopardy to any endangered species. The BOR was at the time in the process of establishing a project operating plan to give balance to "competing purposes and obligations." The court noted that if BOR determined that its proposed action would result in jeopardy, it was required to modify its proposal. The court recited the history leading up to BOR's decision to reduce 2001 deliveries based on a biological opinion that such actions were necessary to address the threat to three fish species.

Thirteen of the fourteen water districts involved held BOR contracts containing a provision holding the U.S. harmless for "any damage, direct or indirect," resulting "on account of drought" or other causes of "a shortage in the quantity of water available" from project sources.

Three days following the decision by the BOR to cut off deliveries to the plaintiffs, two of the districts filed suit for breach of contract before the Federal District Court in Oregon. After the court denied a motion for a preliminary injunction, the plaintiffs voluntarily dismissed their claim. Subsequently, the plaintiffs brought suit before the Court of Claims, alleging an unconstitutional taking of their water. In 2003, the plaintiffs amended the claim to include a breach of contract claim.

It was apparent to the court, that it must consider whether the plaintiffs, water users and irrigation districts, actually had property rights in the Klamath Basin under state law. After examining the language of the act authorizing the Klamath Project in 1905, the court found that the United States had obtained rights to all unappropriated rights in the basin as of 1905. As to pre-1905 rights, the court was persuaded by the evidence that these had been acquired by the BOR, which integrated them into the project. After analysis of a variety of post-1905 claims, the court concluded

that the rights fell into five categories, the first three of which all derived from contracts with the BOR. The court noted that contract interests are protected by the “takings clause,” but noted that there should be caution “against commingling takings compensation and contract damages.” The court noted language from an earlier case: “Takings claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity.” (*Hughes Communication Galaxy v. U.S.*, 271 F3d, 1060 2001)

First, the court found the rationale for applying the use of contractual remedies over takings remedies applied here; “that is, the United States may be viewed as acting in its proprietary capacity in entering into the water contracts in question, and it appears that the affected plaintiffs (as third party beneficiaries) retain the full range of remedies with which to vindicate their contract rights. While the court then noted that the issue of the contract breach “must await another day,” it nevertheless proceeded to examine the relevant provisions of the contracts. In so doing, the court noted favorably the decision by the 9th Circuit Court that water shortage provisions in water contracts with the BOR meant that the BOR was not obligated to deliver the full contractual amount of water, “if such delivery is inconsistent with the ESA.” (*Oneill v. United States*, 50 F.2d 677 (1995) The court also cited the *Rio Grande Silvery Minnow v. Keys* decision.

Second, the court concluded, even as to the contracts that do not contain such shortage provisions, it is at least arguable that the reductions ordered did not result in a breach under the so-called Sovereign Acts Doctrine. “An act of government will be considered to be sovereign so long as its impact on a contract is merely incidental to the accomplishment of a broader governmental objective.” Further, the court said, “Several courts have concluded that the enactment and subsequent enforcement of the ESA should be viewed as a sovereign act.”

The court then addressed the holding in the Tulare Lake case, upholding the plaintiffs’ claims to damages, because the reduction amounted to a physical taking of property. It found the decision to be flawed first of all because it failed to consider whether the contract rights at issue were limited so as not to preclude enforcement of the ESA. Instead, it treated the contract rights of the districts as absolute, without adequately considering whether they were limited in the case of water shortage, “either by prior contracts, prior appropriations or some other state law principle.” Further it never reached the analysis of whether the claim should be treated as a contract breach rather than a takings claim. Therefore, the court found no support in Tulare for the plaintiffs.

Recognizing that the plaintiffs would be left with a claim for breach of contract, and acknowledging the disappointment of the plaintiffs, “who have long invested effort and expense with the expectation of continued deliveries of water,” the court concluded that: “Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property - they enjoy no elevated or more protected status....”

Missouri River Basin

Drought Response

South Dakota Governor Mike Rounds called for a February 7 summit meeting with other Missouri River governors to discuss options for managing the river given the continuing drought. The Army Corps of Engineers had stated it expected runoff into the system during the year to be below normal for a sixth straight year. 2004 runoff was 16.6 million acre feet (Maf), just 66% of the long-term average, and even with normal precipitation, much of the moisture would soak into the dry ground. Water levels at the three largest reservoirs - Oahe, Garrison and Fort Peck - would be 26 to 34 feet below normal by the end of January, according to the Corps. (Billings Gazette, January 15; and Sioux Falls Argus Leader, January 21, 2005)

Governor Rounds believed the Corps' recently announced annual operating plan should be changed to reduce flows from the upstream reservoirs and save water for uses up and down stream next year. If the drought continued, the proposed releases during the current year would increase the likelihood of further harm next year to upstream fishing, irrigation, rural and city drinking water systems, as well as municipal water intakes and power plants in downstream states. Rounds hosted a similar meeting of governors in September 2003, and he believed the Corps would consider operating changes if all the basin states could reach an agreement.

On May 24, the Governors of Iowa, Kansas, Montana, Missouri, Nebraska, North Dakota, South Dakota and Wyoming signed the following resolution: "For several years the Missouri River basin has been suffering from serious drought conditions. Forecasting data indicates that the 2005 run-off looks to continue the drought condition in the upstream basin...adversely affect[ing] the authorized purposes of the Missouri River main stem system, including water supply, power generation, navigation, fish and wildlife, recreation and irrigation. During this drought public water systems, including tribal systems, have experienced problems due to historically low-levels in the main stem reservoirs."

It continues, "The undersigned Governors agree that maximum efforts should be undertaken...to mitigate the effect of the continued drought in the Missouri River basin. We call upon the Corps to undertake its best efforts to conserve water in the main stem reservoirs to the extent legally permissible. The...Governors also agree that we support full and adequate funding for the United States Army Corps of Engineers efforts in the Missouri River Basin to address fish and wildlife recovery, improving water infrastructure and water conservation. In addition, we support the inclusion in a Water Resources Development Act, a provision authorizing the Missouri River Recovery and Mitigation Program. Nothing herein requires, infers or indicates concurrence to use tributary reservoirs for increased navigation support compared to what would otherwise occur without this resolution."

The Summit held earlier in February at the invitation of South Dakota Governor Mike Rounds had produced little agreement between upper and lower basin states. Upper and lower basin states have clashed for years over priorities, with reservoir recreation pitted against commercial barge navigation. But now Missouri flows were too low to support barge traffic between Sioux City, Iowa and Omaha, Nebraska.

According to Mark Johnston, a spokesman for Governor Rounds, "Everyone finally came together to agree this is an issue that needs to come to the attention of the Corps of Engineers. This a big deal. When was the last time that the eight basin governors agreed on anything?"

American Rivers v. United States Army Corps of Engineers

On August 16, the Eighth Circuit Court of Appeals issued its ruling regarding Operation of the Missouri River System Litigation - *American Rivers v. United States Army Corps of Engineers* (No. 04-2737), which was a consolidated series of appeals by various diverse parties challenging the U.S. Army Corps of Engineers' operation of the main stem reservoir system and associated wildlife assessments by the U.S. Fish and Wildlife Service. The court dismissed three claims as moot and affirmed decisions of Minnesota District Court Judge Paul Magnuson, sitting as a Multi-District Litigation (MDL) court, on all remaining claims. In essence, the MDL court upheld the federal defendants' actions as within their discretionary authority under the law. The Eighth Circuit stated, "We review de novo a grant of summary judgment, applying the same legal standards used by the district court."

The court observed that the challenges to the Corps' Missouri River operations arose primarily due to "the persistent drought that has led to recurring conflicts between upstream and downstream water-use interests," and a contention that its actions to prevent flooding and provide "steady summer flows for downstream navigation disrupted the natural habitat of protected bird and fish species...." The court pointed out that the Flood Control Act of 1944 (FCA) authorized the Corps to construct and operate the Missouri River system primarily for flood control and navigation, but for irrigation, hydroelectric power generation, recreation and fish and wildlife purposes as well. "The MDL court concluded that the FCA imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests. We agree."

The court added, "The EIS estimates...that the selected navigation-preclude volumes will lead to the elimination of the entire navigation season only in the four worst drought years out of every one hundred years, and to a navigation season shortened from eight-plus months to less than seven months only in the eight worst drought years out of every one hundred. Under these circumstances, we cannot say that the Corps failed to consider downstream navigation before making its decision.... The Corps' balancing of water-use interests in the 2004 Master Manual...does not evidence a failure to consider the support of downstream navigation, it is not arbitrary and capricious. Therefore, we affirm the grant of summary judgement to the Corps on this claim."

The court further stated, "Appellees North Dakota and South Dakota argue that because damage to the recreation industry would have a more dramatic negative economic impact than would damage to the navigation industry, recreation should receive special priority. Nothing in the text or legislative history of the FCA suggest that Congress intended the priority of interests...to shift according to their relative economic value. Arguments based on the wisdom of the priorities established by the FCA must be addressed to Congress."

With respect to the Endangered Species Act (ESA), the court said, "Case law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a nondiscretionary statutory purpose or require it to exceed its statutory authority." The court opined that the ESA does not prevent the Corps from meeting its statutory duty under the FCA to support downstream navigation.... The 2004 Master Manual demonstrates that the Corps can comply with the elements of the 2003 Amended BiOp RPA [the U.S. Fish and Wildlife Service's biological opinion's reasonable and prudent alternatives] while continuing to operate the dams 'consistent with the purposes stated by Congress' in the FCA.... Because the Corps is able to exercise its discretion...the operation of the reservoir system is subject to the requirements of the ESA. It was therefore in accordance with law for the Corps to consult with the FWS to produce the 2003 Amended BiOp. We affirm the grant of summary judgement to the Federal Defendants."

Petition to Supreme Court

On November 8, North Dakota Attorney General Wayne Stenehjem announced he would file a petition asking the United States Supreme Court to review the Eighth Circuit Court of Appeals decision issued in August.

Stenehjem stated, "With all due respect, I believe the 8th Circuit misinterpreted the Flood Control Act. Navigation is not entitled to priority over recreation and other interests. I maintain the Flood Control Act requires the Corps to equitably balance all uses." In his petition Stenehjem asked the Supreme Court to overturn the Eighth Circuit decision and clarify the priority issue. He noted, "In light of the overwhelming economic value of recreation on the Missouri River to upstream states, it is imperative to take this case to the Supreme Court."

Rio Grande Basin

Silvery Minnow Sanctuary

On October 11, the Bureau of Reclamation, in partnership with the Middle Rio Grande Conservancy District, U.S. Fish and Wildlife Service and City of Albuquerque, broke ground on a new Rio Grande silvery minnow sanctuary under the shade of the cottonwoods of the bosque in southwest Albuquerque. Senator Pete Domenici suggested the idea of a “refugia” more than two years ago, as an alternative to preserve the endangered species in the face of the Rio Grande drying up due to drought and agricultural and municipal water diversions. He was on hand, along with: Interior’s Assistant Secretary for Water and Science, Mark Limbaugh; Geoff Haskett, Fish and Wildlife Service Southwest Region Acting Director; Middle Rio Grande Conservancy District Chief Engineer Subhas Shah; and Albuquerque’s Open Space Division Superintendent Matt Schmader, to turn the first shovels of dirt. The facility is similar to that already operating at the Rio Grande Biological Park, which WSWC members toured as part of our 2004 Fall meetings in New Mexico. The sanctuary also mimics river conditions, but is being built along the river and is designed to more closely imitate the diverse natural river channel with rearing and breeding habitat for the minnow, gates to allow fish and eggs being held to be released directly back into the river as conditions permit, and fish screens to provide protection from predator fish.

Agreement/Settlement

On February 23, a coalition of conservation organizations announced an agreement had been reached with the City of Albuquerque that created new mechanisms to acquire, store and release water to benefit the health of the Rio Grande. The agreement between the city and the Defenders of Wildlife, Forest Guardians, National Audubon Society and Sierra Club opened the door for all parties to work together to keep the Rio Grande “alive and free.” It set aside space to store water for environmental purposes in Abiquiu Reservoir -- 30,000 acre-feet. It also committed \$250,000 for a pilot water leasing program – \$225,000 from the Albuquerque-Bernalillo County Water Utility Authority – which both parties hoped to have matched by federal and state funds. According to Forest Guardians, “Wasteful and inefficient agricultural water use continues to be a significant part of the Rio Grande’s problems, but agriculture can also be a large part of the solution.” The settlement also required the city to modify its water billing system allowing residents to add \$1 per month to their bills to go towards the purchase of environmental water for the Rio Grande.

“It’s a hopeful day for the Rio Grande and the people of Albuquerque,” said John Horning, Executive Director of Forest Guardians. “This agreement reconnects us with the Rio Grande and reaffirms our obligation to ensure its survival.” “We believe this agreement creates a new economic and political foundation which, if built upon, can create even greater resolve to ensure the river reclaims rights to its own waters,” said Letty Belin, one of the plaintiffs’ attorneys. “We are very excited about setting up a savings account for the river and look forward to working with the Middle Rio Grande Collaborative Program to make progress toward more long-term benefits for the river and all who depend on it,” said Kara Gillon, Defenders of Wildlife.

The agreement ended litigation involving the federal San Juan/Chama Water Project, from which the City of Albuquerque draws water. The settlement does not address litigation over the Middle Rio Grande Project involving the Middle Rio Grande Conservancy District. (Forest Guardians Press Release, Feb. 23, 2005)

The Middle Rio Grande Conservancy District (MRGCD) had commissioned its own study of whether or not a water leasing and storage program would put more water in the river when it’s needed. “Our concern is that we don’t know - and, in fact, no one knows - if a program under which

farmers leased water to the city and environmental groups for environmental purposes would actually produce [water] in the river,” said Sterling Grogan, a district biologist and planner. “We think that’s a question that needs to be answered before anyone embarks on a forbearance program.” Subhas Shah, MRGCD’s Chief Engineer, added, “It would not be good [for wildlife or aesthetics] to have farmland go to waste.” Janet Jarratt, a farmer near Los Lunas, said, “As an agricultural interest, rather than seeing a dollar out of someone’s utility bill to transfer more water rights away from agriculture, I would have preferred people see actual [water] conservation efforts in the city.”

Water Project Financing

Rural Water Supply

On May 11, at the invitation of the Senate Energy and Natural Resources Committee, WSWC Vice Chair Duane Smith testified in support of many provisions of S. 895, the Rural Water Supply Act, introduced by Senators Pete Domenici (R-NM) and Jeff Bingaman (D-NM). The testimony was primarily based on a letter adopted by the Council last year commenting on similar legislation. Duane highlighted the changes that had been made consistent with the Council’s comments, and commended the proposed loan guarantee provisions as an important new tool. However, he also pointed out that the Congress’ appropriations for the Clean Water and Drinking Water State Revolving Funds are the primary source of financing for many rural communities’ needs – and should be continued.

Further, he noted many states have programs to assist rural communities meet their water-related needs, and states should be included along with other federal agencies in the needs assessment and project appraisal and feasibility studies provided for in the bill. Duane also summarized many of the challenges state and local agencies face related to providing adequate supplies of high quality water for household and other purposes. He added that the Council also strongly supported enactment of the National Drought Preparedness Act, as it would provide additional technical and financial assistance to rural communities. Lastly, he noted the bill included language recognizing that water rights allocation and administration are state responsibilities.

U.S. Bureau of Reclamation (BOR) Commissioner John Keys testified in support of S. 895, expressing strong support for provisions that would allow communities to approach BOR early in the process, complete their own appraisal and feasibility studies, and appropriately determine a community’s capability to pay their share of study costs, as well as operation and maintenance (O&M) costs. Further, he suggested that exploring local desalination opportunities, particularly treating brackish ground waters for potable uses, may be a viable alternative to rural water supply projects that pump and transfer water from rivers over great distances at great expense. He also expressed support for requiring interagency coordination. The Administration also liked the Title II loan guarantee program, but Keys said he was still studying several aspects of S. 895. He noted the apparent need for some type of overall programmatic framework to guide how projects once authorized are planned, built and managed. He also suggested the Committee add criteria for economic and financial impacts for project assessment and feasibility studies.

After the hearing, Senator Domenici issued the following statement: “I consider it tragic that millions of Americans still live without safe drinking water in this day and age. This privation is unacceptable in a country of our wealth and resources. This problem is especially prevalent in rural America where some small towns and counties can’t afford to build new or upgrade deteriorated water infrastructure. The USDA has estimated that more than 1 million people in the United States have no water piped into their homes, and more than 2.4 million have critical drinking water needs

that are not being met. In my state alone, the New Mexico Finance Authority estimates more than 100 rural communities don't have sufficient water supply and water treatment facilities."

"While Congress has authorized various programs to address the problem over the past 30 years, there isn't enough federal money in these programs to meet the great need in rural America. The EPA estimates that \$75 billion needs to be spent on rural water systems around the country in the next 20 years to bring them up to current standards. Many areas of the country can't afford the needed improvements. The bill I have written with Senator Bingaman establishes a federal loan guarantee program within the Bureau of Reclamation that would allow rural communities access to the money they need while respecting the limits of the Reclamation's budget. It also expedites the appraisal and feasibility studies which allow these communities to assess how best to address their water supply needs and act accordingly."

Desalination

Senator Pete Domenici (R-NM), Chairman of the Energy and Natural Resources Committee, opened a October 20 hearing on S. 1016, the Desalination Water Supply Shortage Prevention Act of 2005, introduced by Senator Mel Martinez (D-FL) and his S. 1860, the Energy and Water Technology Research, Development and Transfer Program Act of 2005, stating, "Water scarcity and declining water quality are increasingly critical issues throughout the world. As the world's population grows and stores of fresh water are depleted, finding additional sources of fresh water is critical to meeting our energy needs and ensuring peace and security domestically and abroad. Widespread water shortages are expected here at home.... [T]hirty-six states anticipate shortages in the next ten years. While we have long dealt with water shortages in the West, available supplies of water in the east coast have also been stretched thin.... Boston, Atlanta and much of Florida are nearing the end of readily available water. Without significant technological advancements that allow us to better utilize, conserve, and produce additional water in a cost-effective manner, it is unclear how we will meet this need."

Douglas Faulkner, Acting Assistant Secretary of Energy (DOE) for Energy Efficiency and Renewable Energy testified: "Although supplying and distributing water is largely a local responsibility, we believe there is a Federal role in providing appropriate scientific and technological support for these efforts. S. 1016...poses a narrower question: Should the Department of Energy subsidize electricity costs at desalination facilities? We believe the answer is no.... It is our view that incentive payments are not the best means to remove the energy cost barriers to desalinating water. Instead, we feel continued targeted Federal support for desalination research and development consistent with the Administration's Research and Development Investment Criteria, as well as our ongoing efforts to reduce energy demand and increase supply through the adoption of comprehensive energy legislation, will have a larger impact in the long-run on reducing desalination costs...."

He added, "The Department of Energy finds S. 1860 to be well intentioned as it shares our view that we must develop innovative new approaches to dealing with the regional, national, and global challenges related to water availability and quality. However, we have several concerns regarding the specific language of this bill. First, the bill appears to shift substantial statutory authority from the Secretary to the designated National Labs and places the lead National Labs in inappropriate roles for assessing Federal funding and activities across agencies. We are also concerned that the bill appears to leave out the private sector and its key role in RD&D and commercialization. The bill places as much as two-thirds of the funding at the lead National Labs, largely outside of any merit-based competitive process and it does so with little flexibility, not recognizing that the allocation of funding will vary with the status of technology RD&D and commercialization, and private sector roles. We believe that the funding levels, roles and

responsibilities for the Labs, Universities, and private sector should be determined by the Secretary in order to meet the national needs identified by the legislation.”

Water Rights Litigation

Idaho Watersheds Project v. Jones

In an unpublished memorandum, the U.S. Ninth Circuit Court of Appeals reversed and remanded for further consideration by the Idaho Federal District Court a case involving the alleged taking of a threatened species by the exercise of a valid water right. Dated April 18, the decision raised questions regarding material facts, including whether “the lack of a fish screen or head gate will kill or injure bull trout or will modify habitat in a way that kills and injures bull trout (including by significantly impairing their breeding, shelter, or feeding)” and if there is a “reasonably certain imminent threat.” The Idaho Watersheds Project sued Verl and Tuddie Jones in December 2000, claiming their diversion to irrigate a meadow in the summer “takes” bull trout by blocking their migration and diverting them into a canal.

The district court found that “in a below-average water year” the diversion would be likely to reduce flows to the point migration would be impeded, and that the potential movement of trout into an irrigation canal would be “exposing them to injury.” Therefore, the court issued a permanent injunction prohibiting the Joneses from diverting water unless they were to install a head gate and fish screen. The district court relied on expert testimony on behalf of the plaintiff, even though the expert had not visited or examined the diversion, but instead relied on a Forest Service biological opinion issued under ESA Section 7 (which found the diversion had the potential to adversely affect bull trout if it reduced water flows or they were to enter the canal).

The Jones’ own observations – in over 40 years, they had never seen a bull trout in the irrigation canal – let alone one dead or injured – were supported by Idaho state government biologists. Moreover, the diversion never completely dewatered the creek, and bull trout had been regularly seen both above and below the contested diversion. Thus, genuine issues of material fact remained, which should have precluded summary judgment according to the court. Also, a Section 7 biological analysis found that the direct and indirect effects of irrigation were not likely to affect bull trout, but only the interrelated, interdependent and cumulative effects.

Orff v. United States

On June 23, in *Orff v. U.S.*, the Supreme Court denied California farmers standing to sue the U.S. Bureau of Reclamation in a dispute over the delivery of irrigation water. The farmers purchased water from the Westlands Water District, which receives its water from the Bureau under a 1963 contract. In 1993, the Bureau scaled back water deliveries to Westlands and several other water districts within the Central Valley Project (CVP) service area. The 50% reduction was designed to protect the chinook salmon and delta smelt – both listed as threatened species by the National Marine Fisheries Service and U.S. Fish and Wildlife Service, respectively under the Endangered Species Act. The Central Valley Improvement Act (CVPIA) specifically directs the Secretary of Interior to operate the CVP so as to meet all ESA “obligations.” The Bureau concluded that the pumps used to deliver water south of the Sacramento-San Joaquin Delta could harm these listed species.

Farmers were forced to cut back their irrigation, leaving significant parcels of farmland dry and wasted. Westlands and others sued the Bureau for breach of contract for failing to fulfill its water delivery obligations. However, after the districts settled their claims through negotiation, some farmers pursued the litigation to force the Bureau to restore the deliveries to their previous levels.

The farmers made two arguments in attempting to circumvent the standing obstacle: First, they argued they were third party beneficiaries to the delivery contract; and second, they argued that the Reclamation Reform Act of 1982 §390uu acted as a waiver to the government's sovereign immunity from suit. §390uu provides in part: "Consent is given to *join* the United States as a *necessary party* defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." (Emphasis added) The district court dismissed some of the claims and granted summary judgement for the U.S. on others.

Writing for the unanimous court, Justice Thomas responded to the first argument by pointing out the farmer's dependence on §390uu. Even if the farmers were deemed third party beneficiaries to the 1963 contract, and thus able to "adjudicate... the contractual rights of a contracting entity of the United States," the federal government would still have to consent to being sued. Justice Thomas stated emphatically that the argument "founders on the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign." In light of that principle, the Court went on to find the language of §390uu insufficient to waive immunity. To "*join the United States as a necessary party...*" was interpreted to allow the United States to be joined as a defendant in an action between two other parties – "for example, two water districts, or a water district and its members—when the action requires construction of a reclamation contract and joinder of the United States is necessary." However, §390uu does not permit a plaintiff to sue the United States alone. Therefore, absent any express consent to be sued, the farmers did not have standing to sue the Bureau.

Of note, the dicta of the Court suggested individual farmers may have been able to satisfy the standing requirement under the language of §390uu by suing Westlands and the other water districts for delivery of their water, then joining the Bureau of Reclamation later as a "necessary party."

RESOLUTIONS AND POLICY POSITIONS

Under the Council's rules of organization, its functions include the investigation and review of water-related matters of interest to the western states. Moreover, from time to time, the Council adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of western water resources. The following were adopted by the Western States Water Council in 2005.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

April 22, 2005

Position No. 261

The Honorable Pete Domenici
United States Senate
328 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Domenici:

The Western States Water Council has strongly supported legislation which you have introduced in the past to establish a National Drought Council to improve national drought preparedness, mitigation, and response efforts. We support S. 802, the National Drought Preparedness Act of 2005, which you have introduced, and H.R. 1386, which Rep. Alcee Hastings (D-FL) introduced in the House on March 17th. We urge all western congressional members to cosponsor such legislation in this Congress, and hope the House and Senate leadership will bring legislation to the floor for swift consideration.

Extended drought conditions continue to afflict many parts of the West, and federal legislation is needed to promote coordination of proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought in the United States. Western governors have had a hand in drafting this legislation and have also called on the Congress and the President to support its enactment.

Further, we welcome the introduction of S. 648, by Senator Gordon Smith (R-OR), to extend the authority for drought assistance under the Reclamation States Drought Assistance Act of 1991. Unless renewed, the authority directing the Secretary of the Interior, and U.S. Bureau of Reclamation, to provide specific drought preparedness and planning assistance, as well as mitigation and response services, will expire on September 30, 2005. This bill has been referred to the Senate Energy and Natural Resources Committee, and we support its prompt enactment.

The Western States Water Council is an organization representing eighteen states. Its members are appointed by their respective governors to address a broad range of water policy issues affecting the West. The West is characterized by its aridity, and the current, continuing drought has highlighted the fact that water availability circumscribes our economic and environmental well being and quality of life. Even more humid parts of the West, specifically the Northwest, are facing dire water supply problems this year. Drought is a continuous threat.

Therefore, we urge the Congress and the Administration to act now to extend or make permanent Interior's drought assistance authority, pass S. 648, and authorize the appropriation of \$20 million for such assistance. We also strongly support passage of S. 802 and H.R. 1386 to establish a National Drought Council to improve drought policy, preparedness, mitigation and response.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Hal D. Simpson'.

Hal Simpson, Chairman
Western States Water Council



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July 18, 2005

Position No. 262

The Honorable Conrad Burns, Chairman
Senate Appropriations Committee
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Senator Burns:

The Western States Water Council strongly supports the U.S. Geological Survey's Cooperative Water Program (CWP) and opposes any effort to force the privatization of related USGS services. We are very concerned about the intent of the following report language accompanying the House Interior and Related Agencies Appropriation bill (H.R. 2361, H.Rpt 109-80 Title I - Department of the Interior p. 53), which reads:

"The Committee is concerned with reports that suggest that the Water Resource Division (WRD) of the Survey is providing or seeking to provide a variety of commercial services to Federal and non-Federal entities in direct competition with the private sector. The Committee strongly discourages WRD from providing commercially available services to Federal and non-Federal entities through its cooperative water program unless these services are performed by a private sector firm under contract with the Survey or the entity with which the Survey has entered into a cooperative agreement. The Committee encourages the Survey to focus its efforts on carrying out its important mission of serving as a national database for hydrologic data, theory, and research. The Survey should submit a report to the House Committee on Appropriations by December 31, 2005, regarding its past, present and future efforts to avoid competing with the private sector."

In the absence of any contradictory Senate report language, the House language is controlling— unless the House-Senate conference committee chooses to address the issue. We urge you, as a member of the Conference Committee, to include express language in the Conference Committee's report that provides a clear sense of the Conference to protect USGS cooperative programs and projects.

The House Report language could dramatically change the manner in which the USGS currently interacts with the states and other cooperators. Given that many of the specific capabilities needed to carry out Cooperative Water Program projects are "commercially available," the USGS could be expected to contract out a substantial portion of CWP work to the private sector. Currently, cooperators have the option of choosing a private contractor or working with the USGS. The House report language could effectively take the USGS option off the table. The USGS role could be reduced to one of merely "serving as a national database." The hydrologic research and analyses provided by USGS, upon which many western states depend, would suffer.

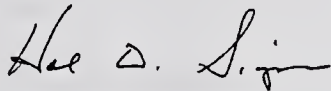
For many years, the Council's member state officials have worked closely along side USGS national and district staff. While states also utilize other public and private experts, an enduring and valuable relationship with the USGS has evolved that can not be replaced. There could be serious negative implications as a result of the House report language.

Historically, USGS has played a vital role in collecting and disseminating hydrologic data, conducting interpretive studies, developing hydrologic methods, and conducting hydrologic research. USGS has an exceptional reputation and strong record of acceptance for the quality of its work and impartial presentation. As an regional organization of states, the Council believes this is critically important as contentious trans-boundary issues arise among states and internationally. We know that the USGS is well aware of the need to avoid competition with the private sector and has policies in place for this purpose. We would urge them to continue that vigilance and encourage the private sector to engage in dialogue with the USGS on the issue.

Our members are partners in the Cooperative Water Program and rely on the streamflow data collected and disseminated by USGS, which are the basis for myriad management decisions. Changing the sound paradigm on which this successful federal state-partnership is based and has flourished requires serious consideration and hearings. Otherwise, we risk perhaps irreparable unintended consequences.

Again, we urgently ask you and other members of the House/Senate Conference Committee to ensure USGS will continue to be able to provide the hydrologic information and analyses that are essential to this vital federal and state partnership.

Sincerely,

A handwritten signature in black ink, appearing to read "Hal D. Simpson".

Hal Simpson, Chairman
Western States Water Council

cc: Secretary Gale Norton, Dept of Interior



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July 22, 2005

Position No. 263

Senator Pete Domenici, Chairman
Energy and Natural Resources Committee
United States Senate
328 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Domenici:

We would like to reiterate our support for legislation to meet the water supply needs of rural communities, particularly western communities, which have suffered from drought for a number of years. The Western States Water Council represents eighteen states, which include all the Reclamation Act States, plus Alaska. Our members are appointed by their respective governors and we advise the governors on a broad range of water policy issues. We are closely affiliated with the Western Governors' Association (WGA), and we appreciate the opportunity we had in May to testify regarding S. 895, the Rural Water Supply Act of 2005, on behalf of the Council and WGA.

Much of the West is characterized by its aridity, and the current drought highlights the fact that water availability continues to define and circumscribe our economic and environmental well being and quality of life. This is particularly true in many small rural communities, which may often lack the ability to meet pressing water supply needs and federal safe drinking water standards and requirements without some assistance from state or federal sources. Lacking the economies of scale available to larger cities, small communities face much higher costs per capita. We strongly support federal legislation to provide technical and financial assistance for small rural communities, augmenting available local and state resources.

We believe that Title II of S. 895, cited as the "Twenty-First Century Water Works Act," which authorizes a new loan guarantee for certain projects, is an important and much needed tool. We appreciate your efforts in sponsoring and shepherding S. 895 through the federal legislative process. We hope to see this legislation enacted soon to create a systematic, integrated approach to investigating, authorizing and constructing projects to meet rural western needs in close cooperation with State, local and regional entities, as well as tribes. We strongly believe states should play a key role in the development and establishment of guidelines and criteria for determining program eligibility and in selecting project priorities. Moreover, federal efforts should be coordinated with state and local watershed plans. It is also important that non-Federal entities retain title to projects.

Again, we applaud your efforts to address the water supply needs of rural communities and hope to be able to work together to authorize, fund and implement an appropriate program and specific projects, in partnership with state and local entities and tribes, to meet present and future water needs in the West. Hopefully, we can find ways to ensure western water supplies meet minimal standards of public health and are sufficient to carry us through times of shortage.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Hal D. Simpson'.

Hal Simpson, Chairman
Western States Water Council

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of the
Weather Modification Research and Technology Transfer Act
Seattle, Washington
July 15, 2005**

WHEREAS, the 109th Congress is considering Senate Bill 517 and H.R. 2995, the Weather Modification Research and Technology Transfer Authorization Act of 2005, to develop and implement a comprehensive and coordinated national policy and cooperative program, and authorizes \$10 million per year for fiscal years 2005 through 2014 to enhance federal support for weather modification, promote research and development, and provide financial assistance to private and public entities; and

WHEREAS, western states support operational weather modification projects, realize the benefits derived from weather modification, and permit weather modification activities for various purposes ranging from snow augmentation to hail suppression, under varying state statutes and programs; and

WHEREAS, much of the West depends on water that originates from snow, and the American Meteorological Society (1998), World Meteorological Organization (2001), and the National Academy of Sciences (2003) have all found that there is strong physical and statistical evidence that wintertime weather modification activities can create additional snowpack in watersheds; and

WHEREAS, the Weather Modification Association and the North American Interstate Weather Modification Council support a “coordinated national program” to further the science, understanding, and utility of weather modification; and

WHEREAS, several Council member states are also members of the North American Interstate Weather Modification Council (California, Utah, Wyoming, North Dakota, Nevada, Texas, Oklahoma, New Mexico, and Kansas) and work together to facilitate the exchange of interstate atmospheric resource management information; and

WHEREAS, western states would benefit greatly from a coordinated national program that advances the field of weather modification as it relates to precipitation enhancement for water management – and assists in the scientific evaluation of western states weather modification operations, while complying with related state laws; and

WHEREAS, the U.S. Bureau of Reclamation has in the past provided much needed technical assistance and funding through the Weather Damage Modification Program for the benefit of western states.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council strongly supports enactment of the Weather Modification Technology Transfer Act of 2005 (S. 517 and H.R. 2995), with the addition of a provision assuring compliance with applicable state laws.

BE IT FURTHER RESOLVED that the Council also supports continued funding for the federal Weather Damage Modification Program.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
THE RECLAMATION FUND
Seattle, Washington
July 15, 2005**

WHEREAS, in the West, water is indeed our “life blood” - a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life - the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

WHEREAS, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies “reserved, set aside, and appropriated as a special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land...” in seventeen western states, to be continually invested and reinvested; and

WHEREAS, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children...;”⁸ and

WHEREAS, the Secretary of the Interior was authorized and directed to “locate and construct” water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service -- today’s U.S. Bureau of Reclamation; and

WHEREAS, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the “ultimate greatest good of the greatest number;” and

WHEREAS, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 42 billion kilowatt hours of energy each year from 58 hydroelectric power plants for some nine million people, and further providing flood control, recreation, and fish and wildlife benefits; and

⁸State of the Union Address, 1907

WHEREAS, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return about \$600 million to the United States Treasury, prevent some \$500 million in damages due to floods each year, and generate billions of dollars in economic returns from agricultural production; and

WHEREAS, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

WHEREAS, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902; and

WHEREAS, the Administration's budget requests and Congressional appropriations have failed to keep pace with authorized spending, with the President's FY2006 request for the Bureau of Reclamation's Water and Related Resources account totals \$802 million, down from \$859 million appropriated last year and the request anticipates that off-setting receipts collected by the Western Area Power Administration (WAPA) for operation and maintenance and other expenses allocated by Reclamation to WAPA would reduce the final appropriation to some \$771.6 million; and

WHEREAS, according to program and financing figures and estimates, Reclamation's new budgetary authority (gross) for obligation has dropped from \$994 million in FY2004, to \$972 million in FY2005 and is projected to be \$919 million in FY2006 - total gross outlays would be \$940 million in FY2006, compared to an estimated \$1.028 billion in FY2005 and \$953 million in FY2004; and

WHEREAS, meanwhile, the unobligated balance in the Reclamation Fund is expected to grow from \$3.877 billion at the end of FY04 to an estimated \$4.812 billion for FY05 and \$5.905 billion in FY2006; and

WHEREAS, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources and its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil and mineral-related royalties – but these receipts are only available for expenditure pursuant to annual appropriation acts; and

WHEREAS, with growing receipts in part due to high energy prices and declining federal expenditures for Reclamation purposes, the unobligated figure gets larger and larger while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully utilize the funds provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs -- recognizing and continuing to defer to the primacy of western water laws in allocating water among uses -- and work with the States to meet the challenges of the future.

BE IT FURTHER RESOLVED, that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).



WESTERN STATES WATER COUNCIL

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Position No. 266

The Honorable George Radanovich, Chairman
Subcommittee on Water and Power
Committee on Resources
1522 Longworth House Office Building
Washington, D.C. 20515

Attn: Kiel Weaver (FAX: 202-226-6953)

Dear Mr. Chairman,

I am Hal Simpson, the Chairman of the Western States Water Council, which consists of representatives appointed by the governors of eighteen western states. I am writing on behalf of the Council in support of legislation to reauthorize appropriations for the state water resources research institutes program which were established under provisions of the Water Resources Research Act. I understand the Senate may act on a bill (S. 1017) this summer which would be referred to your Subcommittee for action.

Members of the Council are familiar with the work of the Water Resources Research Centers and Institutes located in their respective states. These centers have assisted our state water agencies in a number of ways as they seek to address the increasingly complex challenges associated with water management in the West.

The Water Resources Research Centers and Institutes provide important support to western state water agencies in long-term water planning, policy development, and management. They provide a research infrastructure that utilizes the capabilities of universities in our states to address the water resources challenges we face. Most importantly, their research agenda are determined in consultation with an advisory committee of the respective State officials and stakeholders that allows each state to solve its own problems by methods most appropriate to its own situation. In addition, their outreach and information-transfer activities are very valuable to the water communities in the various western states.

This is a very worthwhile partnership of the federal and state government to use academic expertise to solve water problems. I respectfully request you and your Subcommittee take the lead in ensuring that authorization of appropriations for the state water resources research program be extended for an additional five years, through Fiscal Year 2010.

Sincerely,

A handwritten signature in black ink, appearing to read 'Hal D. Simpson'.

Hal Simpson, Chairman
Western States Water Council



WESTERN STATES WATER COUNCIL

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July 22, 2005

Position No. 267

The Honorable Gale Norton
U.S. Department of Interior
Interior Building, MS 7229
1849 C Street, NW
Washington, D.C. 20240

Dear Secretary Norton:

On behalf of the Western States Water Council, I am writing to urge you to request \$74 million in FY 2007 funding for the U.S. Geological Survey's Cooperative Water Program. This would merely restore the program's real purchasing power to its FY 2003 level and reverse the slow erosion in spending that is robbing us of streamgages and data that is vital for the sound management of our western water resources. The FY 2006 appropriation of \$63,770,000 (requested by the President and approved by the House and Senate) is not sufficient to reverse the continuing decline in real federal spending due to unfunded or only partially funded federal salary and other cost increases.

Our members are critical partners in the Cooperative Program, and we believe this should be the highest USGS funding priority related to water. However, the failure of the Administration and the Congress to match state contributions on a 50%-50% basis – with flat or nearly flat federal spending in the face of continually rising federal costs – has shifted the financial burden for maintaining the national streamgaging system to the states. In FY 2004, our member states provided \$51.57 million, while matching federal appropriations totaled only \$30.94 million – \$20.62 million short. We cannot continue to bear this increasing financial burden, which threatens this long-time partnership.

With the number of streamgages declining and the need for streamflow data increasing, human life, our quality of life, our security, and our property are at considerably greater risk. Myriad federal, state, tribal, and local government agencies, as well as private entities and individuals, use this data to manage flooding and drought, as well as predict future water supplies for our agricultural, municipal and industrial needs, plus energy/hydropower, recreation and environmental uses (including protecting endangered species). However, federal funding has been allowed to erode to the point that it threatens the availability, quantity, quality and timeliness of basic data.

Recognizing the Nation's fiscal challenges, we ask only that recent spending cuts be reversed, and not that state monies be fully matched at this time. However, with record low snowpacks in the Northwest, record high precipitation in the Southwest, continuing drought in some areas and other areas experiencing flooding, timely and accurate streamflow information for sound water resources management has never been more important.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Hal D. Simpson'.

Hal Simpson, Chairman
Western States Water Council

**REVISED
POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
THE CLEAN WATER ACT
July 15, 2005**

The Western States Water Council endorses the following policy resolutions adopted by the Western Governors' Association, and will allow these policies to guide the Council in matters relevant to implementation and potential reauthorization of the Clean Water Act:

- 05-10 Water Quality Issues in the West
- 05-14 State Authority Regarding the Federal Hydropower Licensing Process
- 05-25 Watershed Restoration through Partnerships
- 05-26 Abandoned Mines Land (AML) Programs

In cases where Clean Water Act-related issues arise that are not addressed by these policies, the Council may develop new positions accordingly.

**POSITION
of the
WESTERN STATES WATER COUNCIL
Regarding
WATER EFFICIENCY STANDARDS FOR PLUMBING PRODUCTS
Seattle, Washington
July 15, 2005
(revised and readopted)**

WHEREAS, making efficient and beneficial use of scarce water resources has been, and continues to be, a fundamental objective of the Western States; and

WHEREAS, the importance of water use efficiency continues to grow as the finite water resources of the Western States support increasing levels of population and economic activity; and

WHEREAS, new technology that makes more efficient use of water in its various applications offers significant economic and environmental benefits to the Western States; and

WHEREAS, efficient plumbing products, including ultra-low flush toilets (ULFTs), became widely available in the early 1990's, and have undergone substantial product development and performance improvement since that time; and

WHEREAS, the American Water Works Association Research Foundation (AWWARF) has commissioned the most comprehensive end-use study of indoor water use ever undertaken in North America, recording indoor water usage in twelve cities, the majority located in the Western States; and

WHEREAS, the AWWARF studies have documented *per capita* indoor water use reductions averaging over 30% in single-family homes equipped with water-efficient plumbing fixtures, fittings, and appliances currently on the market, compared to homes without such products; and

WHEREAS, the States comprising the Western States Water Council have identified drinking water and wastewater infrastructure needs totaling more the \$60 billion over the next 20 years, as contained in *Needs Surveys* forwarded to Congress by the Environmental Protection Agency; and

WHEREAS, many of these capital costs can be postponed or reduced by reductions in the volume of flows that must be accommodated; and

WHEREAS, in recognition of the public and private benefits of efficient plumbing products, between 1990 and 1992 the States of Arizona, California, Nevada, Oregon, Texas, Utah, and Washington adopted statewide standards for new plumbing products, including a standard of 1.6 gallons per flush for toilets; and

WHEREAS, following action by these States and others, the Energy Policy Act of 1992 was enacted in October 1992 containing uniform national water efficiency standards for plumbing products, including a standard of 1.6 gpf for toilets, with the active support of many water and wastewater utilities in the Western States; and

WHEREAS, other Western States have subsequently incorporated comparable water efficiency standards into their plumbing codes; and

WHEREAS, uniform national efficiency standards simplify and reduce the States' burden of enforcement regarding sale and installation of ULFTs and other water-efficient plumbing products; and

WHEREAS, uniform national efficiency standards maintain a national market for plumbing products, allowing manufacturers to achieve full economies of scale and encouraging wider competition in all jurisdictions; and

WHEREAS, enactment of such legislation will not benefit the communities and consumers of the Western States; and

WHEREAS, enactment of such legislation will increase the burden of enforcement on Western States and communities seeking to maintain efficiency standards for plumbing products, and will reduce the reliability and predictability of water savings resulting from such standards; and

WHEREAS, enactment of such legislation may disadvantage Western States seeking to maintain water efficiency standards for plumbing products due to the diversion of a disproportionate share of federal financial assistance for water and wastewater infrastructure in future years to States choosing to make less efficient use of water by relaxing or repealing water efficiency standards for plumbing products.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council supports the retention of uniform national water efficiency standards for plumbing products.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

October 28, 2005

Position #270

Secretary Mike Johanns
U.S. Department of Agriculture
Room 200-A Whittenburg Building
1400 Independence Avenue, SW
Washington, DC 20250

Dear Secretary Johanns:

The WSWC appreciates the opportunity to respond to your Federal Register notice requesting comments on the scope of a potential 2007 Farm Bill. The Western States Water Council has a keen interest in reauthorization of the Farm Bill, particularly those conservation and other provisions that affect or have the potential to affect water management in the West. As a former western governor, you are well aware of the water supply and water quality management challenges that are facing western states. Agriculture, rural communities, growing metropolitan areas, recreation-related interests and fish and wildlife often struggle to find sufficient water of adequate quality to meet their needs. Recurring drought only exacerbates the perennial problems related to water scarcity. In some areas, all existing uses may no longer be sustainable as ground water levels and spring flows decline and rivers and streams dry up. Further, the continuing evolution of non-point source pollution control programs presents the agricultural community with new regulatory challenges.

Agriculture has played and will continue to play an important role in the western states. The eighteen states that are members of the Council stand ready to work with producers, agricultural water user associations, and agricultural water districts to help them ensure the continued reliability of their water supplies and comply with federal and state water quality regulations. Our member states are also committed to working with rural communities to help them improve the reliability and quality of their drinking water supplies. We would encourage the inclusion of state water planning and management, water rights administration, and water pollution control agency representatives on USDA state technical committees.

Any successful strategy for meeting our future water needs will require a mix of various incentives to promote greater water conservation and reduce use, while increasing available supplies and providing more storage to help us get through temporary shortages. This may require a shift in uses and a reallocation of some water rights, which must be accomplished in complete compliance with both substantive and procedural requirements of state water law pertaining to water right transfers and the subsequent administration of transferred water rights.

Maintaining agricultural production and rural economies while accommodating other growing needs and uses will be challenging and the programs and resources provided through the Farm Bill should be used to help western producers, rural communities, and states address problems related to both the quantity and quality of our water resources. The reauthorization of the Farm Bill in 2007 will present an important opportunity to help producers sustain their operations while also encouraging and facilitating better stewardship of our water resources. In this regard, the Council desires to forge a closer partnership with USDA in addressing water issues.

The following comments address a number of opportunities where the Administration and the Congress may act to encourage better water management.

First, water conservation and the management of agricultural drainage to protect both surface and ground waters must be national priorities, separate and distinct from the existing priority for the control of non-point source pollution of water. These priorities should be specifically included in Commodity Credit Corporation regulations for financial assistance under the Environmental Quality Improvement Program (EQIP). Similarly, contracts should generally be tailored on a case-by-case basis to achieve net water savings by reducing total water use. In this regard, water conservation benefits must be evaluated in view of their cumulative impact on surface and ground water supplies. This generally requires a site or case specific analysis, as not all efficient water application practices actually result in a reduction in total water use, and in some instances can reduce water supplies available for other uses.

Second, EQIP's Surface and Ground Water Conservation Program should be expanded and funded at a level sufficient to meet the demand for related contracts. The 2002 Farm Bill added this program to provide cost-share payments, incentive payments, and loans to producers to carry out eligible water conservation activities including: (1) improvements to irrigation systems; (2) enhancement of irrigation efficiencies; (3) conversion to the production of less water-intensive agricultural commodities; (4) conversion to dryland farming; (5) improvement of the storage of water through measures such as water banking and ground water recharge; or (6) mitigation of the effects of drought. The benefits of such action have yet to be fully realized. The Secretary is to provide EQIP assistance to a producer only if it will facilitate a conservation measure that results in a "net savings" in ground water or surface water resources in the agricultural operation of the producer. However, on-farm savings may or may not result in a reduction in total water use, when measured off-farm, given the overall impact on ground water levels or surface streamflows. More efficient on-farm water use can in some instances lead to even greater overall water use as producers seek to apply more water on existing acreage or expand their acreage to increase production.

Third, it is important to recognize that salt is the single most common water pollutant across the West, and one that can have serious impacts on continued agricultural productivity. The 2007 Farm Bill must provide authorizations and funding for salt management activities. For example, the Colorado River Salinity Control Program is successfully managing this threat to the water supply of some 26 million residents of the Southwest in Arizona, Nevada and California. While authorized by separate legislation, it is funded under the EQIP program through an earmark, and should continue to be funded at its FY06 level.

Fourth, an additional western water quality priority related to agricultural activities is selenium impacts. Much like salinity, the source of selenium typically is native shale, although human disturbance can exacerbate the quantity of selenium reaching western streams. The EQIP program should also give priority to projects that result in selenium control, particularly where necessary to achieve compliance with water quality standards. This topic has been the subject of recent discussions between federal, state and local interests involved with selenium control efforts.

Fifth, western states are concerned with the apparent difficulty in getting EQIP funds to address problems related to Confined Animal Feeding Operations (CAFOs), in spite of the fact that nonpoint source water pollution control is an existing national EQIP priority. Moreover, USDA, EPA and states should work in partnership to coordinate activities under EQIP, Section 319 of the Clean Water Act and state water quality related programs so as to help producers come into compliance.

Sixth, the Conservation Reserve Program (CRP), Conservation Reserve Enhancement Program (CREP), Wetlands Reserve Program (WRP) and Wetlands Reserve Enhancement Program (WREP) have all proven to be popular and effective tools for promoting stewardship, and offer great promise in helping address water management issues. About two-thirds of our member states have or are in the process of signing CREP agreements with USDA. Nebraska recently entered in to an agreement to use CREP contracts to reduce ground water use in order to comply with a negotiated settlement of a dispute over compliance with the Republican River Compact. Similar approaches to the use of CRP-related programs to help solve water

problems should be encouraged. In this regard, the Council recommends that acreage and funding caps for the CRP, WRP, CREP, and WREP be increased over the levels now contained in the 2002 Farm Bill. In general, CRP programs should carefully consider and give priority to enrolling lands where ground water levels and surface water resources are stressed. Reducing overall depletions of surface and ground water would lead to more sustainable use and long-term economic and environmental benefits.

Further, the 2007 Farm Bill should authorize CREP enrollment of irrigated lands that could be converted to dryland farming. While irrigated lands are not excluded from participation in CRP programs, relatively few contracts have been executed due to cost and other considerations. Moreover, retiring irrigated lands may not be the best alternative as much of this land may not be suitable for native grasses, but could be dry farmed with the possibility of greater benefits for water conservation and aquifer sustainability in certain areas of the West. Dryland farming would also provide for some additional income for farmers and would assist the local economy more than retiring the land from all production. Additionally, the existing statute should be amended to permit the Secretary to target and prioritize enrollment of lands in a CREP or WREP to best achieve the goals for which a CREP or WREP was established.

Seventh, in the interest of better integrating state water management technical expertise with NRCS delivery of USDA programs to producers, we recommend that the 2007 Farm Bill authorize NRCS to fund state agencies to work with producers and local water agencies or conservation districts to help develop regional water management programs and projects.

Eighth, invasive non-native species are a growing problem for western water users and should receive greater emphasis and funding for control under Farm Bill conservation programs. Salt cedar (*tamarisk spp.*) has invaded some 1.2 million acres of riverbanks in the West according to USDA estimates. The trees displace native vegetation and wildlife habitat, consume large amounts of water, degrade water quality, increase soil salinity, and increase threats from fires and floods. Similarly, other invasives such as purple loosestrife, hydrilla, eurasian water milfoil, caulerpa, giant salvinia common water hyacinth, zebra mussels, New Zealand mud snails, Chinese mitten crabs, European green shore crabs and other non-indigenous fish and mollusk species compete for food and habitat. Through competition and predation, these species have a tremendous negative impact on threatened and endangered native species, and also impact western water management. We ask that USDA conservation programs explicitly recognize the need to control non-native nuisance species and help producers do so.

Ninth, we recommend that the research and development authorizations in the 2007 Farm Bill include an emphasis on water-related research activities that will benefit agricultural water users. Such research could include effects of climate change on water supplies and evapotranspiration, use of weather modification for supply enhancement and suppression of hail, water conservation technologies, agricultural drainage water treatment technologies, affordable desalination and treatment of brackish waters, and salt tolerant crops, etc.

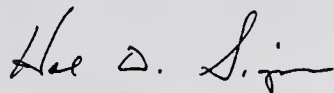
Tenth, small rural communities are the most at risk with respect to a wide range of drinking water problems, including inadequacy of their existing surface or ground water supplies, contamination from pollution, and difficulty complying with Safe Drinking Water Act regulations. Authorized appropriations for the 2007 Farm Bill should be increased over current levels to provide a safety net for America's most at-risk communities through the Emergency Community Water Assistance Grant Program for Small Communities. Further, USDA Rural Development's Rural Utilities Service (RUS) should be authorized to fund state agencies to work with rural water systems to bring them into compliance with federal and state drinking water regulations. Similarly, RUS should have the same authority to fund state agency programs as it does for non-profit organizations in providing support to rural water systems through the Rural Water Circuit Rider Program, in coordination with rural water associations.

Secretary Johanns
October 28, 2005
Page 4

Position #270

We appreciate the opportunity to comment on these matters related to the 2007 Farm Bill and we hope to forge a closer working partnership with USDA in addressing water needs.

Sincerely,

A handwritten signature in black ink, appearing to read "Hal D. Simpson".

Hal Simpson, Chairman
Western States Water Council



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

October 28, 2005

Position #271

Dr. Michael Griffin, Administrator
National Aeronautics and Space Administration

Vice Admiral Conrad C. Lautenbacher, Administrator
National Oceanic and Atmospheric Administration

P. Patrick Leahy, Acting Director
U.S. Geological Survey

Dear _____:

On behalf of the Western States Water Council, representing the governors of eighteen western states, I am writing to raise your awareness of our concern regarding the Landsat Program, which provides U.S. satellite images of the Earth's land surface and surrounding coastal areas. Specifically, we are alarmed by the potential loss of the thermal band which presently provides useful and increasingly critical information for the management of western water resources. The thermal band provides data vitally important to the computation of evapotranspiration. The Idaho Department of Water Resources has been involved with NASA for a number of years in an operational remote sensing application development project. The Surface Energy Balance Algorithm for Land (SEBAL) relies on thermal data from the Landsat satellites to compute evapotranspiration for water management uses.

We understand that current plans under the Landsat Data Continuity Mission call for the Landsat satellites to be replaced with the National Polar-Orbiting Operational Environmental Satellite System. We would strongly urge you to ensure that the appropriate thermal sensors are included to replace the present Landsat capabilities and data, and will work with the Congress to ask for adequate funding.

No other remote sensing capabilities available at this time, nor for the foreseeable future, can provide the high resolution, continuous coverage, workable return time (8-16 days, the shorter the better), consistency of viewing angle and time of day, nor the long history allowing analysis of the evolution and change in evapotranspiration. This is clearly a successful story in matching the value of research and practical applications.

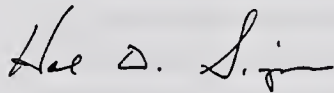
This information is of tremendous value, and is gaining wide-spread use in the West. It has been used in California, Colorado, Idaho, Montana, Nevada, New Mexico, Texas, Utah, Washington and Wyoming for such diverse purposes as: (1) evaluating interstate river compact and international treaty compliance with respect to depletions from irrigation; (2) measuring ground water recharge and the impacts of pumping ground water on the water table and natural vegetation; (3) evaluating impacts on endangered species; (4) studying the impacts of land use transitions from agricultural to residential use; (5) regulation of surface and ground water use and administration of water rights; (6) determining a multi-basin water balance for planning purposes; (7) better managing irrigation practices to achieve water savings; and (8) evaluating spatial and seasonal trends in agricultural water use.

Such activities have been undertaken over the past five years or have been proposed in the Arkansas, Bear, Boise, Lemhi, Upper and Lower Colorado, Upper and Middle Rio Grande, Milk, North Platte, Russian, Salmon, San Juan, Snake, South Platte and Yakima River Basins, as well as East Texas (using Landsat thermal images from 1985 to the present). This work has involved federal, state and local agencies, and tribal

members, as well as academic interests and consulting groups. More and more uses of Landsat data for water management will continue to emerge in the future, due in part to the substantial drop in costs for ETM and TM images since 1998.

We strongly support NASA and NOAA spending to provide for the continued availability of Landsat-comparable thermal data, and oppose any move to delete the thermal band from future satellites. We hope to be able to work with you to ensure the availability of this data for the growing number of applications that will continue into the future as we struggle to balance water uses and demands in the West.

Sincerely,



Hal Simpson, Chairman
Western States Water Council

cc. John Cunningham, Systems Program Director, NPOESS
Bill Ochs, Project Manager, Landsat Data Continuity Mission, NASA
John Keys, Commissioner, Bureau of Reclamation
Dr. Gene Whitney, Science Policy Analyst, National Science and Technology Council

RESOLUTION
on the
Federal Government's Role in Expediting State General Stream Adjudications
October 21, 2005

WHEREAS, the Western States Water Council, representing eighteen western states, most of which are actively engaged in general stream system adjudications, wish to hereby communicate their recommendations on how the federal government might help expedite such adjudications in the West; and

WHEREAS, states in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including rights to waters claimed by the United States under either state or federal law; and

WHEREAS, these adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants, but such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West; and

WHEREAS, Congress recognized the benefits of state general adjudication systems and by adoption of the McCarran Amendment (43 U.S.C. '666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims; and

WHEREAS, although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications; and

WHEREAS, this holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers, representing a drain on the resources of states which significantly inhibits the ability of both state and federal agencies to protect private and public property interests; and

WHEREAS, because they are not subject to fees and costs like other water users in the adjudication, federal agencies have filed questionable claims that may have been otherwise tempered;

WHEREAS, western states have attempted to address this problem in the Congress, where bills have been introduced to require all federal agencies filing water right claims in state adjudications to pay fees and costs to the same extent as a private party to the same proceeding; however, this proposal, as well as alternative legislation developed by New Mexico to provide federal funding support to states for general stream adjudications, based on a formula assessing the relative need for such support, have not advanced within Congress as yet.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council recommends policy changes at the federal level as follows:

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. One alternative would be to establish a uniform federal fee structure, which we recognize may require that the money for such fees be diverted from some other federal programs. A federal representative should be designated to work with western state water administrators either to establish an equitable uniform fee structure for adjudicating federally held water rights or to devise some other means of providing for federal payment of a fair share of adjudication costs, and to help identify sources of federal funds for such fees. Importantly, the federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. The federal government should not pursue separate actions in federal court that deal with the subject matter of a state court adjudication during the pendency of the adjudication, such as the Lower Rio Grande quiet title action filed in 1997 in Federal District Court in New Mexico and the 2001 Adair filings in Federal District Court in Oregon. Such actions divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. Negotiations and mediation often occur with regard to federal claims within the context of ongoing adjudications. To be effective, there must be high-level federal involvement in such negotiations. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter claims by the Forest Service which are entirely inconsistent with the United States Supreme Court holding in *United States v. New Mexico*. We believe that direction to follow the holding of *United States v. New Mexico* would avoid questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.
5. Another way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims is to require that the federal government provide whatever evidence it may have to substantiate its claims at the time of filing. Given the complexity and the contentiousness involving such claims, we believe states are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

October 27, 2005

Position #272(b)
(See also Position #247)

The Honorable Gale A. Norton, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

and

The Honorable Alberto R. Gonzales
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Secretary Norton and Attorney General Gonzales:

I am writing on behalf of the Western States Water Council to communicate some suggestions on how the federal government might help expedite state general stream systems adjudications in the West. While the suggestions should not be viewed as a comprehensive listing, the steps we have identified, if implemented, would accelerate achievement of the mutually beneficial goal of quantifying the amounts, priorities, and other elements of water rights in river basins of the West. We hope to engage in further discussions with you regarding this important objective.

First, some background may be helpful for those with whom you may choose to share this letter. States in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including the rights to waters claimed by the United States under either state or federal law. These adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants. Such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West. Congress recognized the benefits of state general adjudication systems and by adoption of the McCarran Amendment (43 U.S.C. '666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims.

Although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications. This holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers. This drain on the resources of states and lack of federal government financial support significantly inhibit the

ability of both state and federal agencies to protect private and public property interests. This is nowhere more evident than in the Klamath Basin where approximately 400 of the 700 claims being adjudicated are federal claims. The complexity of these federal claims, coupled with a series of lawsuits filed in federal court by federal agencies, has significantly delayed the state adjudication. Further, because they are not subject to fees and costs like other water users in the adjudication, federal agencies have filed questionable claims that may have been otherwise tempered. In Idaho, for example, the Forest Service initially filed 3,700 last-minute claims in the Snake River Basin adjudication just prior to the initial court action on the adjudication fee issue. After the Forest Service used these last-minute claims to quantify the fiscal impact of paying fees and after the State of Idaho incurred considerable expense investigating these claims, the Forest Service withdrew all but 61 of the claims, and the state adjudication court has since dismissed all but 9 of the claims.

With this background, the western states have attempted to address this problem in the Congress. Bills were introduced in the Congress to require all federal agencies filing water right claims in state adjudications to pay fees and costs to the same extent as a private party to the same proceeding. These proposals did not advance within the Congress as yet, and so we would like to suggest some policy changes for this Administration's consideration as follows:

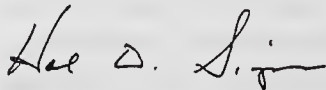
1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. One alternative would be to establish a uniform federal fee structure, which we recognize may require that the money for such fees be diverted from some other federal programs. A federal representative should be designated to work with western state water administrators either to establish an equitable uniform fee structure for adjudicating federally held water rights or to devise some other means of providing for federal payment of a fair share of adjudication costs, and to help identify sources of federal funds for such fees. Importantly, the federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. The federal government should not pursue separate actions in federal court that deal with the subject matter of a state court adjudication during the pendency of the adjudication, such as the Lower Rio Grande quiet title action filed in 1997 in Federal District Court in New Mexico and the 2001 Adair filings in Federal District Court in Oregon. Such actions divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. Negotiations and mediation often occur with regard to federal claims within the context of ongoing adjudications. To be effective, there must be high-level federal involvement in such negotiations. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter claims by the

Forest Service which are entirely inconsistent with the United States Supreme Court holding in *United States v. New Mexico*. We believe that direction to follow the holding of *United States v. New Mexico* would avoid questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.

5. Another way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims is to require that the federal government provide whatever evidence it may have to substantiate its claims at the time of filing. Given the complexity and the contentiousness involving such claims, we believe states are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.

We are anxious to engage in further discussions regarding these matters with you and/or your representatives. We look forward to hearing from you in this regard.

Sincerely,

A handwritten signature in cursive script, appearing to read "Hal D. Simpson".

Harold D. (Hal) Simpson, Chair
Western States Water Council



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

December 2, 2005

Position #273

The Honorable Joshua Bolton
Office of Management and Budget
Room 252 Eisenhower Executive Office Building
Washington D.C. 20503

Dear Director Bolton:

The Western States Water Council would like to urge continued support for the Nonpoint Source Grant program administered by the U. S. Environmental Protection Agency under Section 319 of the Clean Water Act. EPA and OMB have agreed on long-term measurable goals to measure success of the nonpoint source grant program, and at least level funding is needed to accomplish those goals.

The nonpoint source grant program has contributed significantly to water quality improvements in the Western states through support of nonpoint source abatement projects directed at agricultural, silvicultural, abandoned mine land, and urban runoff. Some may suggest dismissing the nonpoint source grant program as being duplicative of Farm Bill programs. However, nonpoint source pollution control is not merely a matter of funding agricultural Best Management Practices, the major thrust of the Farm Bill.

There is no question that the nonpoint source grant program can and does enhance local involvement in traditional implementation projects, which will aid delivery of Farm Bill programs. However, the nonpoint source grant program also provides opportunities to address traditional nonpoint source pollution control needs that are not eligible for traditional Farm Bill funding. The following are among those areas:

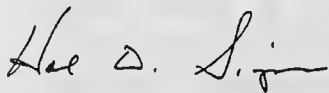
- Watershed coordination, planning and monitoring (e.g., by watershed councils) to effectively target limited resources to subunits most likely to be contributing a majority of the pollutant loads seen in the watershed.
- Technology transfer and demonstration of new and emerging Best Management Practices addressing agricultural pollutants, including those associated with irrigation return flows.
- Implementation of Best Management Practices in urban centers to combat pollution arising from stormwater runoff.
- Implementation of Best Management Practices for construction activities, mining (such as Good Samaritan clean-up sites), and addressing modifications to hydrology and habitats.
- Stream restoration and habitat improvement which restore the biological integrity of surface waters of the nation.

- Developing and implementing total maximum daily loads (TMDLs) to remedy impaired water quality.
- Increase awareness by individuals and communities on the significance of nonpoint source pollution in water quality problems, and the contribution to water quality improvement stemming from their individual actions.

The three decades of progress made under the Clean Water Act demonstrates the impact of Federal, state, and local investment in controlling point sources. We are now in the era where similar commitments must be made for controlling nonpoint sources. Nonpoint source pollution is the largest remaining contributor to the impairment of the nation's waters. There is no duplication of effort between the nonpoint source grant program and the USDA programs. Both are essential cogs in the Federal strategy to improve water quality in the nation's waters.

Again, we urge continued support and funding in the FY 2007 budget for the nonpoint source grant program at EPA.

Sincerely,



Hal Simpson, Chairman
Western States Water Council

cc: The Honorable Mike Johanns, U.S. Department of Agriculture
The Honorable Stephen Johnson, Environmental Protection Agency

RULES OF ORGANIZATION

Article I - Name

The name of this organization shall be "THE WESTERN STATES WATER COUNCIL."

Article II - Purpose

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources.

Article III - Principles

Except as otherwise provided by existing compacts, the planning of western water resources development on a regional basis will be predicated upon the following principles for protection of states of origin:

- (1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.
- (2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.
- (3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

Article IV - Functions

The functions of the Western States Water Council shall be to:

- (1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.
- (2) Investigate and review water related matters of interest to the Western States.

These rules incorporate the last changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

- (3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.
- (4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.
- (5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.

Article V - Membership

(1) The membership of the Council consists of not more than three representatives of each of the states of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming appointed by and serving at the pleasure of the respective Governors. Member states of the Western Governors' Association, which are not members of the Council, shall be added to membership if their respective Governors so request. The Executive Committee may, upon unanimous vote, confer membership upon other western states, which are not members of the Western Governors' Association, if their respective Governor so requests.

(2) Member states may name alternate representatives.

(3) Any state may withdraw from membership upon written notice by its Governor. Further in the event any state becomes delinquent in paying dues as set forth in Article V (5) for a period of three years, the state will be excluded from Council membership unless and until the current year's dues are paid.

(4) The Executive Committee of the Council may, by unanimous vote, confer the status of Associate Member of the Council upon states it deems eligible. Associate Membership may be granted for a period of up to three years, during which time the state may appoint two official observers to participate in Council activities and receive all printed material disbursed by the Council. Associate Member states shall have no vote in Council matters. The Executive Committee shall, through regular Council voting procedures, establish the appropriate level of dues for Associate Member states. In addition to determinations concerning Associate Member states, the Executive Committee may, when appropriate, establish fees for participation in Council activities by non-members.

(5) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privilege afforded by virtue of its membership to participate in Council activities and to receive all printed materials dispersed by the Council shall be withheld pending the payment of dues, beginning at the start of the fiscal year following the delinquency.

Article VI - Ex-Officio Members

The Governors of the member states shall be ex-officio members and shall be in addition to the regularly appointed members from each state.

Article VII - Officers

The officers of the Council shall be the Chair, Vice-Chair and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

Article VIII - Selection of Officers

The Chair, Vice-Chair and Secretary-Treasurer, who shall be from different states, shall be elected from the Council by a majority vote at a regular meeting to be held in July of each year. These officers shall serve one-year terms. However, the Chair and Vice-Chair may not be elected to serve more than two terms consecutively in any one office. In the event that a vacancy occurs in any of these offices, it shall be filled by an election to be held at the next quarterly Council meeting.

Article IX - Executive Committee

(1) Each Governor may designate one representative to serve on an Executive Committee which shall have such authority as may be conferred on it by these Rules of Organization, or by action of the Council. In the absence of such a designation by the Governor, representatives of each state shall designate one of their members to serve on the Executive Committee. Any Executive Committee member may designate an alternate to serve in his/her absence.

(2) The Council may establish other committees which shall have such authority as may be conferred upon them by action of the Council.

Article X - Voting

Each state represented at a meeting of the Council shall have one vote. A quorum shall consist of a majority of the member states. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed to each member of the Council at least 30 days prior to a regular meeting and 10 days prior to a special meeting at which such matter is to be considered; provided, that such matters may be added to the agenda at any meeting by unanimous consent of those states represented at the meeting. In any matter put before the Council for a vote, other than election of officers, any member state may upon request obtain one automatic delay in the voting until the next meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote. No recommendation may be issued or external position taken by the Council except by an affirmative vote of at least two-thirds of all member states; provided that on matters concerning out-of-basin transfers no recommendation may be issued or external position taken by the Council except by a unanimous vote of all member states. On all internal matters; however, action may be taken by a majority vote of all member states.

Article XI - Policy Coordination and Deactivation

With regard to external positions adopted after being added to the agenda of the meeting by unanimous consent, such external policy positions shall be communicated to the member governors of the Western Governors' Association (WGA) and the WGA Executive Director for review. If after 10 days no objection is raised by the governors, then the policy position may be distributed to appropriate parties. In extraordinary cases, these procedures may be suspended by the Executive Director of the WGA, who will consult with the appropriate WGA lead governors before doing so.

Policy positions will be deactivated three years after their adoption. The Executive Committee will review prior to each regular meeting those policy statements or positions due for sunseting. If a majority of the Executive Committee members recommend that the position be readopted by the Council, then such position shall be subject to the same rules and procedures with regard to new positions that are proposed for Council adoption.

Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

Article XIII - Meetings

The Council shall hold regular meetings three times each year at times and places to be decided by the Chair, upon 30 days written notice. Special meetings may be called by a majority vote of the Executive Committee, upon 10 days written notice.

Article XIV - Limitations

The work of the Council shall in no way defer or delay authorization or construction of any projects now before Congress for either authorization or appropriation.

Article XV - Amendment

These articles may be amended at any meeting of the Council by unanimous vote of the member states represented at the meeting. The substance of the proposed amendment shall be included in the call of such meetings.

**POLICY
regarding
PROPOSED POLICY POSITIONS
of the
WESTERN STATES WATER COUNCIL**

July 16, 2004

Introduction

The following policy is designed to improve the process by which the Western States Water Council considers and adopts external policy positions. It augments, but it does not supplant, existing procedures established in the Council's by-laws.

As soon as practicable following distribution of the "30-day Notice" containing proposed policy positions for consideration by the Council, the staff, after consultation with the Chairman, will organize a conference call. Participants in the conference call will include members of the Executive Committee, other Council representatives as deemed appropriate by the Chair who are associated with the proposed policy positions, as well as the chairpersons of the standing committees that will consider the positions at the Council meeting. The purpose of this conference call will be to discuss the issues raised by any proposed policy positions and to identify problem areas that may require further exploration and discussion to achieve consensus. The Chairman will designate individuals to take the lead in this effort, so that any differences may be resolved prior to the Council meeting.

Credentials

Whenever a person who is not a Council representative is attending on behalf of a Council member at a regular or special meeting of the Council, either in person or via conference call, a written notification to this effect must be provided to the Council offices to assure that the person is serving in the appropriate capacity. Since delegations to the Council from each state consist of more than one person, but each state has only one vote, the Executive Committee member for each state shall be responsible as an internal state matter for coordinating and communicating the official position of the state relative to voting on proposed policy positions.

Council Committee Chairs

The standing committees of the Council will be the primary forum for discussion and debate of policy issues prior to consideration by the Full Council. The respective chairs of the standing committees of the Council shall have the responsibility to attempt to resolve any remaining differences that surface during the discussion of proposed policy positions at the respective committee meeting. While this will not always be possible, additional efforts to reconcile opposing views and attempt to reach compromise will improve the chances for consensus when the matter is brought before the full Council.

10 Day Review

The by-laws require a ten (10) day review period by the Western Governors' Association for proposed external policy positions that were not included in the 30-day Notice. In order to comply with the spirit of this policy, external positions that are included in the 30-day Notice, but then are substantially revised at the Council meetings prior to adoption, shall also be subject to a 10-day review by the Western Governors' Association. Further, the Council Chair at his or her discretion, and in consultation with WGA staff, may choose to provide a 10-day review period for any policy positions which do not result from total consensus at the Council meeting.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

MEMORANDUM

TO: Council Members

FROM: D. Craig Bell, Executive Director

DATE: December 11, 2006

RE: 2005 Annual Report

This memorandum is to enclose a copy of the Annual Report of the Western States Water Council for 2005. This effort is part of our ongoing endeavors to keep the governors, their staffs, and others apprised of Council activities, as well as to provide Council members with what we hope may be a useful reference. Our annual report represents a comprehensive review of water resources issues in which the Council was involved during the year 2005. Due to its comprehensive nature and other priorities, it has taken us much longer to complete than we had hoped, for which we apologize.

I believe the annual report accurately reflects the level of activity of the Council during the year. We have appreciated your support of these activities. It is only through such support that our efforts have been successful.

Enclosure

